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IN THE

Supreme Court of the United States

OCTOBER TERM, ...

No. 377....

JEROME F. DUGGAN, Trustee of the Estates of Christopher Engineering Company, a corporation, Debtor, and of National Aircraft Corporation, a corporation, Subsidiary Debtor, and HASCAL SCHNEIDER and MAX SCHNEIDER doing business as Seco-Lite Manufacturing Company, Petitioners,

vs.

IDA MAGIDSON, Executrix of the estate of Phil Magidson, deceased, Respondent.

JEROME F. DUGGAN, Trustee of the Estates of Christopher Engineering Company, a corporation, Debtor, and of National Aircraft Corporation, a corporation, Subsidiary Debtor, and HASCAL SCHNEIDER and MAX SCHNEIDER, doing business as Seco-Lite Manufacturing Company, Petitioners,

vs.

IDA MAGIDSON, Executrix of the estate of Phil Magidson, deceased, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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vs.

IDA MAGIDSON, Executrix of the estate of Phil Magidson, deceased, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Petitioners, Jerome F. Duggan, as trustee in reorganization for Christopher Engineering Company, a corporation,

principal debtor, and for National Aircraft Corporation, subsidiary debtor, by appointment of the United States Court in Bankruptcy (In Reorganization) for the Eastern Division of the Eastern District of Missouri, by leave of said court, and Hascal Schneider and Max Schneider, co-partners doing business as Seco-Lite Manufacturing Company, on their own behalf, respectfully pray that a writ of certiorari issue of review a decision of the United States Court of Appeals for the Eighth Circuit rendered on two separate appeals from final judgments of a United States District Court in a dependant proceeding in equity in which these petitioners were appellees, and the late Phil Magidson was appellant. After the entry of the judgment involved the said Phil Magidson died and his executrix, Ida Magidson, has been duly substituted as respondent hereto. (Cert. Rec.)

The opinion of the Court of Appeals was rendered by a panel of three Judges and its opinion is reported:

Advance Sheets #4 of June 28, 1954, 212 Fed. (2) p. 748.

The petitioners have filed with their petition a certified copy of the record and nine copies of the record as printed for the use of the court below.

The applicable judgments, opinion, findings and conclusions of the District Court are printed at pages 237-259, of the printed record filed herewith.

Opinions related to the subject matter are reported:

State ex rel Duggan v. Kirkwood (Mo. Sup.), 357 Mo. 325; 208 S. W. (2) 257;

Magidson v. Duggan, etc. (8th Cir.), 180 Fed. (2) 743;

Duggan, etc. v. Sansberry, et al., 327 U. S. 499, 90 L. Ed. 809.

Date of judgment and orders on motions for rehearing.

The opinion complained of was announced and judgment entered on May 11, 1954. The petitioners timely filed their

motion for a rehearing and to transfer to the court en banc, which motion was on July 1, 1954, in all respects, denied without an opinion by the panel which heard the case on the merits.

Thereafter petitioners submitted to all the Active Judges of the Circuit their suggestions or motion for a rehearing en banc, which was, on August 24, 1954, ordered filed as of July 13, 1954, and on the same day it was ordered by a controlling vote of the active Judges that the request for rehearing en banc be denied and that the said motion or suggestions for rehearing be submitted to the panel of the Court who heard the cases on the merits for such disposition as the panel might deem appropriate. Thereafter, on the 7th of September, 1954, the panel concluded that the order theretofore issued by it denying a rehearing before the panel or division be adhered to. (Cert. Rec.).

JURISDICTION.

The Jurisdiction of this Court is invoked under the provisions of the Judicial Code as amended; Title 28 USC Sec. 1254, and this petition is filed within the time prescribed by Title 28 USC Sec. 2101.

The jurisdiction of the Court of Appeals was by virtue of Title 28 USC Sec. 1291.

The jurisdiction of the District Court over the dependant plenary action involved, was that of a Court of Bankruptcy under Chapter X of the Bankruptcy Act as interpreted in Austrian v. Williams, 331 U. S. 642; 91 L. Ed. 1718.

CONCISE STATEMENT OF GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

Generally. The decision was rendered in a dependant proceeding to collect assets brought by a trustee in reorganization of a debtor and subsidiary debtor against a confidential employee of the debtors to recover, on the theory of unjust enrichment and by the remedy of a constructive trust, certain profits realized by the confidential employee as the result of alleged breaches of confidence. Reviewing a judgment for the plaintiff, the Court of Appeals has rendered a decision which, in so many particulars, is so impertinent and grossly erroneous in substance and form and so in conflict with the established rules of equity and accepted procedure that the mere enumeration and argument of the errors is calculated to obstruct the jurisdiction of this Court by rendering it impossible to present to this Court a fair and adequate petition for certiorari without infringing on the rules of this Court pertaining to conciseness of statement.

The opinion is otherwise so wide in scope and revolutionary in effect that it constitutes a departure from the ac-

cepted and usual course of judicial procedings, not in certain particulars only but in its whole scope and effect, all of which can be determined from the face of opinion appended hereto, and petitioner submits that the decision on its face is of a character that calls for this Court's powers of supervision.

The decision in important particulars is in excess of the Court's jurisdiction; and conflicts with the universal rules of equity; with the settled rules of decision established by its own circuit; with the settled rules of decision of probably all the other circuits; with the settled rules of decision of this Court and with the settled rules of decision of the State of Missouri believed to constitute the controlling local law in the proceeding involved herein, and conflicts with the settled rules of decision of probably all the States of the Union. The Court of Appeals has in derogation of the universal rules of equity, based on the general experience and moral conceptions of mankind, decided the case on novel moral and equitable conceptions heretofore unknown to the law. More specifically:

1. The decision impairs the purposes and effective administration of the Bankruptcy Act by denying, in a collateral proceeding, full force and credit to the judgment orders admitting the debtor and subsidiary debtor to reorganization, and the Court has reviewed, on speculation as to the facts, such final judgments and has denied relief to a trustee on the ground that the evidence was insufficient to establish the subsidiary relationship between the debtors and that the judgments approving their respective petitions and admitting them to reorganization were not supported by adequate evidence.

2. Contrary to the settled rules of equity the decision applies against the petitioner, a trustee appointed under the Bankruptcy Act, a doctrine analagous to the "clean hands" doctrine, modifying such doctrine, however, by charging and applying against the trustee indefinite acts of misconduct allegedly committed by the managing officers of the debtors at a time prior to the institution of the bank-

ruptcy proceeding involved. In any case, the alleged acts of misconduct recited by the Court of Appeals were not related to the case on trial and did not inequitably affect the defendant to the action.

3. The decision omitting to review undisputed evidence of a factual relationship of confidence, limits the application of the rules of equity relating to fiduciaries and unjust enrichment to those relationships arising from direct contract between the parties and denies petitioner relief for lack of a direct contractual relationship between the fiduciary and the subsidiary debtor, and has denied altogether the equitable rules relating to constructive fraud and constructive trusts, and, in any event, the defendant having entered into an employment contract with the principal debtor and having expressly covenanted to be loyal to a class of organizations inclusive of the subsidiary debtor, the Court of Appeals has disregarded and denied petitioner the benefit of the general rules of contract applicable to third party beneficiaries.

4. The Court of Appeals denied petitioner the benefit of the doctrine of constructive trusts and the remedy of subrogation for lack of evidence of actual damages to the beneficiary or evidence that, but for the intervention and misconduct of the alleged fiduciary, it could or would have made the profits involved by its own exertions, and has in effect ruled that by reason of the beneficiary's financial distress (based on pure speculation) the fiduciary's obligations were suspended or relaxed and that in such circumstance a confidential agent is free to exploit the business of his beneficiary for his own private benefit without fear of retribution.

5. The decision is against the public interest and the administration of justice in that, in derogation of the simple and universally accepted adverse inferences arising from fraud and perjury by a party to an action in the preparation and trial of his case, the Court of Appeals has ruled that in such cases a party's fraud and perjury amounts substantively to nothing. In that respect, the decision runs counter

to the common experience and understanding of mankind and to the secular and moral law, and the decision is against the public interest because it tends to bring courts of justice into disrepute and to encourage fraud and perjury in the preparation and trial of cases pending in courts of justice.

6. The decision of the Court of Appeals announces a departure in important particulars from the usual and accepted course of judicial proceedings and the Court has exceeded its powers as a court of review by initiating and trying directly in the Court of Appeals, and on pure speculation or facts or assumption of facts dehors the record, issues of fact not submitted to or tried by the lower court, with the result that the petitioners have in any event been denied relief and their property and property rights without a constitutional hearing or an opportunity to be heard, contrary to the due process provisions of the Fifth Amendment to the Constitution of the United States and contrary to accepted and orderly procedure in courts of justice.

7. The Court of Appeals has exceeded its jurisdiction as a court of review and has undertaken sua sponte and in a collateral proceeding to exercise supervisory power over a district court and to review and determine matters not relevant to or within the compass of the appeal and has, in excess of its jurisdiction, undertaken to review collaterally on the facts, and on speculation and evidence or assumptions of facts dehors the record, the propriety of the judgment orders of the lower count approving the petitions for reorganization from which the petitioner derives his title and office and has reversed the judgment of the trial court on the basis of an irregular and impertinent attack on the judgment orders involved, calculated to impair and hinder the administration of bankruptcy proceedings.

For all of which reasons petitioners urge that the decision and the situation presented and precipitated by it requires in the public interest the intervention of this Court and the exercise of its power of supervision over the Court of Appeals involved.

QUESTIONS PRESENTED.

Question 1.

Whether or not the decision of the Court of Appeals, appended hereto, on its face and considering its scandalous contents and deviations in form and substance from accepted appellate practice and settled rules of equity, is of such character as to establish from mere inspection that the Court of Appeals, in reviewing the case involved and announcing the particular opinion, has departed from the usual and accepted course of judicial proceedings, and failed fairly and judicially to consider and decide the case on the record properly before it and on settled principles of equity and has flagrantly gone beyond the compass of the appeal and has rendered a decision calculated to obstruct the jurisdiction of this Court by unduly interfering with the ability of the petitioner, within the limitations of the rules of this Court relating to conciseness of statement adequately to petition this court for review and to unduly burden this court and counsel.

Question 2.

May a court of appeals in a collateral proceeding by a trustee in reorganization to recover assets deny relief on the ground that the record produced on the appeal did not contain evidence adequate to support the original judgment admitting the corporations to reorganization?

Question 3.

May a court of appeals, in a suit brought by a trustee in reorganization to recover assets, deny plaintiff relief on a theory analagous to the "clean hands" doctrine because of alleged inequitable acts committed by the debtors or their officers prior to their resort to the Bankruptcy

Act and on acts which had no relation to and did not affect the cause of action involved in the proceeding under review, and did not impair any recognized equity of the defendant?

Question 4.

Whether or not a fiduciary or confidential relationship is necessarily dependent upon direct contract between the parties, or may a court of equity declare the relationship from facts and circumstances and, in the event of the abuse thereof by the fiduciary to his unjust enrichment, grant relief by the remedy of a constructive trust.

Question 5.

Whether or not, in a proceeding where a beneficiary, charging a fiduciary with an abuse of his trust to his private profit, has elected to claim subrogation to the alleged fiduciary's inequitable profits, it is necessary for the beneficiary to establish by evidence that it has suffered actual damages as the result of the fiduciary's wrongdoing, or is the beneficiary in such case entitled to recover the fiduciary's unjust gain or enrichment regardless of whether or not the beneficiary has suffered actual damages?

Question 6.

Whether or not, in an equity case, where a defendant is charged with fraud and fabricates evidence and wilfully perjures himself on the trial of the action, the trier of the fact may infer from such fabrication, fraud and perjury that the defendant is conscious of his guilt of the fraudulent acts preferred against him and of the weakness of his defense and its lack of truth and merit and apply such inference as substantive evidence applicable to the whole case, or, in such case, is defendant's fabrication of evidence and fraud substantively of no evidentiary effect, other than authorizing the court or jury to disregard the defendant's testimony unless corroborated?

Question 7.

Whether or not a Federal Court of Appeals, on review of an equity case tried before a district court where the district court has concluded that the insolvency or financial straits of certain debtors represented by a trustee in reorganization was irrelevant to the issues, and accordingly no inquiry or trial was had in the lower court on the question of such insolvency or financial straits, may a Court of Appeals, as an incident to a review of the case on appeal, upon concluding that the question of insolvency or the financial straits of the debtors was relevant and material to the equity of the trustee's case, proceed without remanding the case to the lower court for further inquiry and to permit him to introduce evidence on that issue, conduct an ex parte inquiry on an issue as to the fact of such insolvency or financial straits of the debtors without affording or being able to afford the plaintiff an opportunity to be heard or to present evidence on such issue, determine such issue as an original issue in said Court of Appeals, and upon concluding that the debtors were insolvent deny plaintiff relief, and whether or not, in any event, it can determine such issues upon facts and assumptions of fact derived by the Court of Appeals from sources other than the record in the case on appeal and upon facts and evidence never submitted to or weighed and determined by the lower court?

STATEMENT.

The petition for certiorari involves a decision of the United States Court of Appeals for the Eighth Circuit on appeal from two judgments rendered in an action to recover assets brought by the petitioners, Jerome F. Duggan, as trustee in reorganization for the estates of Christopher Engineering Company, principal debtor, and National Aircraft Corporation, subsidiary debtor, as plaintiff, against one Phil Magidson (now deceased) and co-petitioners, Hascal and Max Schneider, doing business as Seco-Lite Manufacturing Company, as defendants. Ida Magidson his executrix has been duly substituted on the record for the deceased defendant.

As against defendant Magidson the suit was to recover, as assets of the estates, Magidson's share of the profits accrued to him from a certain joint enterprise negotiated and organized by him with the defendants Schneider to manufacture and sell, necessarily in competition with the subsidiary debtor, certain airplane parts commonly called hinge horns and airplane bolts. The Schneiders were joined as defendants because of their interest in the undistributed profits of the enterprise and for the purpose of an accounting.

Trustee Duggan, the petitioner, claimed Magidson's share of the profits as trustee under the Bankruptcy Act on the theory 1) That Magidson, as a skilled and confidential employee of the principal debtor, a corporation engaged in the business of engineering and planning for other organizations under a written employment contract binding him to fidelity to its interests and to the interests of its clients and employers, was likewise under a fiduciary obligation to the subsidiary debtor as a third party

beneficiary according to the covenants of his written contract of employment with the principal debtor, and 2) That regardless of contract and regardless of the legal relationship between the principal and subsidiary debtors, he was factually obligated to the subsidiary debtor as a fiduciary because he had by its consent interested himself in the business and affairs of the subsidiary debtor or to aid in promoting its general business and its hinge horn program and, with consent of the common officers of both companies, (themselves fiduciaries) he had come to a knowledge of its business affairs, its hinge horn program and the potentialities of profit therefrom and was factually, regardless of direct contract, a fiduciary for it and was equitably disabled under the general rules of equity based on public policy from procuring and retaining the private profits resulting to him from the joint venture organized by him with the Schneiders. 3) That as an employee and agent of the principal debtor and its fiduciaries defendant was bound by its or their fiduciary obligations to the subsidiary.

The issues being severed, the claim against Magidson for subrogation was tried first, resulting in a finding (R. 232) and judgment (R. 259) subrogating the petitioner as trustee to Magidson's share of the undistributed profits involved, together with a personal judgment against him for certain monies advanced to him from the profits prior to the suit. During the trial it developed that defendant had from sources other than the joint adventure procured other unjust profits. The pleadings were ordered to stand amended to conform to the proof and to facts admitted by Magidson (R. 252), and the trustee was awarded a personal judgment against Magidson in the amount of such inequitable profits as he had procured for himself from sources other than from the profits involved in the joint adventure with the Schneiders, and a judgment subrogating petitioner to Magidson's ostensible share of the undivided profits and a personal judgment against him for sums previously paid him therefrom and for monies pro-

cured by him inequitably from other sources was entered accordingly (R. 259).

Magidson appealed from the judgment (R. 268).

The defendant having appealed without supersedeas, the Court proceeded to take the accounting on the severed issues involving the Schneiders and entered its judgment directing the partition and distribution of the fund (R. 248) and again the defendant Magidson appealed (R. 300), again without supersedeas. Subsequently the petitioner ordered an execution on the money judgment rendered against Magidson, whereupon, on application to the Court of Appeals, Magidson was allowed to deposit in the registry of the Court of Appeals, a sufficient sum of money to satisfy the execution and the execution was thereupon discharged. (R. 279)

The District Court filed an exhaustive memorandum, findings of fact and conclusions of law and an order directing the decree, which is printed in extenso in the printed record (pages 237 to 259), followed by a decree printed at page 259.

In ruling on the appeals the Court of Appeals did not review or directly rule on that part of the judgment awarding the petitioner a judgment based on Magidson's inequitable profits from sources other than the joint adventure, but struck down that part of the judgment, without review by reversing the judgment against defendant as a whole and dismissing the whole proceeding with prejudice.

Rule 23 of this Court requires a concise statement of the facts material to the consideration of the questions presented.

The Court of Appeals, on page 7 of the Opinion, after reciting certain findings of the lower court, recited:

> "The immediate question is whether the findings of the district court are clearly erroneous"

and proceeded to recite that

"findings are clearly erroneous when not supported by substantial evidence, or against the clear preponderance of the evidence,

(3) based upon an erroneous view of the law."

The Court then recited:

"We turn to a consideration of the evidence on which the court's findings are based." (Opinion p. 8)

The Court then, instead of turning to the evidence in the record upon which the trial court based its findings, devoted some thirteen pages of the opinion to speculative matters entirely dehors the record and a mere reading of which discloses it bore no relation to the claim of the trustee against Magidson to recover assets.

And without comment on the record evidence on page 20 of the opinion the Court ruled:

"There was, in our opinion, no adequate evidentiary basis for the findings of the district court that National was ever a subsidiary of Christopher Engineering, or that these corporations and the partnerships of Brown and Christopher were to all intents and purposes a single entity or enterprise. These findings, we think, are clearly erroneous. Magidson never had any contractual or fiduciary relationship with National. * * * The assets of the debtor corporations were deprived of nothing by Magidson's activities as a joint venturer that they were entitled to or could have obtained if he had never engaged in the joint enterprise with the Schneiders."

We doubt if any question of fact is involved on this petition for certiorari.

The factual relationship on which the petitioner relies, and on which the lower court determined the case, is not seriously disputed and Magidson's own testimony and admissions establish a factual relationship of confidence between him and National in the opinion of the petitioner and

in the opinion of the lower court, and though the evidence which we are about to recite may be unnecessary to a determination of the questions involved in this petition for certiorari, yet, in view of the novelty and uncertainty of the opinion, we deem it appropriate and excusable, if of doubtful necessity, to quote it to some extent in support of the judgment which the District Court rendered.

The Factual Fiduciary Relationship between Magidson and National.

(All Plaintiffs Exhibits referred to were formally offered in evidence R. 152).

On July 1, 1943, shortly after the Christopher Engineering Company was organized, Magidson, a draftsman, designer and sales engineer, entered its employment under written contract. (PX 1, R. 35-152).

The written contract in substance recited that the employer was in the business of engineering and planning for other business organizations; that the business was of a highly confidential character, enjoining upon the employer and all its employees obligations of the strictest loyalty and confidence. It further recited that it was understood and agreed that the nature of the employment was such that Magidson would acquire knowledge and information of a confidential character relating to the business of his employer and its clients and employers. Magidson expressly covenanted:

That during the term of his employment he would faithfully perform all the duties thereof and would not wilfully neglect nor depart from said service or employment, nor do, suffer or consent to the doing of any act or thing detrimental to the interests of his employer. He further covenanted that during the term of his employment and for a period of two years after the termination thereof, however terminated, he would not, directly or indirectly, engage in a like or similar employment on his own behalf or on behalf of any

other person and that neither during the term of his employment nor thereafter would he, without the consent of his employer, disclose to any person any information or knowledge of matters and things acquired, directly or indirectly, by him as a result of or in the course of his employment, concerning the business of his employer or that of its clients or employers, nor would he, without such consent, appropriate, use or employ to his own advantage, or to the advantage of others, either directly or indirectly, any such information or knowledge.

Magidson entered upon his employment and was first assigned to work on a job for Anheuser-Busch Brewing Company (R. 34) and shortly thereafter was assigned by J. M. Brown and A. B. Christopher, who were the managing officers of the Christopher Engineering Company, his contractual employer, (R. 44) and of all the associated organizations (R. 41) to do work for a so-called partnership, Christopher Engineering and Manufacturing Company, (R. 39) factually organized in the name of the managing officers of the Christopher Engineering Company, (R. 208) and engaged generally in manufacturing tools designed by the Christopher Engineering Company. Magidson insisted that he never worked for the Engineering Company after he went to work on behalf of the Manufacturing Company, but he acknowledged that his salary continued to be paid for five months or so directly by check of the Christopher Engineering Company, (R. 37) and that he took orders from Brown and Christopher regardless of where his pay came from (R. 44).

In the course of his employment Magidson was assigned by Brown and Christopher to supervise the installation of certain tooling at the plant of the subsidiary debtor in Elwood, Indiana, (R. 37) whose stock about this time had been acquired ostensibly in the name of managing officers, Brown and Christopher. The National Aircraft Corporation was engaged in building airplanes and carried on a side line of manufacturing and selling so-called hinge horns for other plane manufacturers. (R. 83).

It was conceded that all these organizations were in fact, regardless of ownership, managed and controlled by J. M. Brown and A. B. Christopher, (R. 41) and the stock of National Aircraft Corporation having been acquired nominally by Brown and Christopher, the National Aircraft Company in January, 1943 undertook to retool and develop its business in hinge horns (R. 83). At that time extended conference was had at the plant of National between Brown, Christopher and Carl K. Wollam, then manager of the hinge horn and small parts division of National (R. 85) and Magidson took part in the conference in contemplation of the thought that he could assist in "working some of the bugs out of the hinge horn program" (R. 85).

At the time of the conference National was having difficulty in obtaining certain KS4 bearings for the hinge horn and it was concluded at the conference to retool for the hinge horn operation and make changes in the hinge horn to facilitate its manufacture by mass production methods. (R. 85).

Magidson took part in the conference (R. 85). At that time National was supplying practically all the manufacturers of the CG4 program with hinge horns (R. 85) and ultimately built between thirty and fifty thousand hinge horns (R. 85), which Magidson learned it was selling at a price of $9.75 each. (R. 41).

Following the conference in question Magidson was sent to the plant of Steinway Company to supervise an installation of tools (R. 37), following which he was made sales engineer (outside contact man), he says, for the manufacturing partnership. (R. 37). The District Court found that he served the interests of all the organizations collectively. (R. 242-find. 9).

Magidson himself testified.

> "Prior to my connection with these companies I did not have any experience with hinge horns." (R. 37).

"In the early part of January, 1943, Mr. Brown", "told me National was manufacturing hinge horns." (R. 37).

"I did not try to sell hinge horns, but reinstated several orders given to National for hinge horns." (R. 37).

On January 25, 1943, shortly after the conference, Magidson wired Engle, the general manager of National (R. 37) to send him a list of National's customers, saying "I will contact the ones you don't sell". He followed this wire by letter addressed to Brown or Christopher, (PX 4, R. 40-152). reciting his request to Engle and urging that he have an answer thereto. The letter stated:

"I asked Mr. Engle for a list of those we do not sell hinge horns so that I may contact these prospects—no reply and I want an answer to this."

The letter also reported on the prospects of procuring hinge bearings from a firm in Connecticut. In this connection the letter recited that each ship required 32 bearings, or 192,000 bearings for 6000 ships. (The 6000 ships represented the Government program for 6000 training ships). The letter continued: (R. 40)

"Maybe we could make a deal with these people and get a price, and corner this item, if such a thing is possible. Then we could take care of all the horn business by virtue of the fact that we are able to make quick delivery aided by the exactness of perfect forming of our horns. We could fabricate them in no time at all and get them delivered on a real production basis." (R. 41)

Magidson testified that he recognized Brown and Christopher as his superiors (R. 41). Brown asked him to procure the reinstatement of orders previously secured by National that had been cancelled, and he did so. (R. 41).

On February 4, 1943 Magidson wrote Christopher that he had just received word that Gibson Refrigerator was shopping around for 450 horns and "if I remember rightly we are selling them. Find out what is cooking and if

it looks as though we might be losing this business. If so, let's do something to revive this contract." (R. 41-Pl. 45) (In passing it will be noted that the first order procured by Magidson for the joint enterprise hereinafter referred to was procured from Gibson at a price of $8.00. (R. 98) Though Gibson cancelled the order to the joint enterprise, it also cancelled a current order with National for horns at a price of $9.75 each.

Magidson wrote the General Aircraft Company, on behalf of National, correcting a price quotation and explaining the justice of the fixed price of $9.75 each. (PX 45a, R. 41-152).

Pursuant to Magidson's request to Engle (National's manager) he was, on February 5, 1943, furnished by Wollam, who had recently been placed in charge of the hinge horn division, a list of the customers and prospective customers of National, and advised that if additional hinge horn business was obtained it would be secured from those with whom National was doing business. (PX 42, R. 38-152). In the same letter Wollam expressed the hope that Magidson might procure the KS4 bearings, since they were "the key to the production of the hinge horn."

There was also introduced in evidence time reports, prepared by Magidson, indicating that a portion of his time was expended at various places for "National Aircraft Corporation hinge horns" (PX 7-10, R. 44-152) and Magidson testified:

> "I did not work for Christopher or National, when I worked for the manufacturing partnership, I was under the supervision of Mr. Christophere and Mr. Brown and I did what I was told to do in connection with business affairs. I did not inquire where my pay was coming from. I was paid by the manufacturing partnership for a long time and they had some connection with the Engineering Company with which I had signed the contract." (R. 44).

In February and May, 1946, an action, the forerunner of this suit, was pending in the State Court between Magidson and the Schneiders, involving an accounting and distribution of the profits made in the joint venture. In that connection Magidson's deposition was taken by the Schneiders and he stated in the deposition that in the first part of 1943 he was working for "Christopher Engineering Company as a sales engineer, securing business" and stated that he had "been employed by that corporation about a year and three or four months (R. 45), (which would embrace the total time spent by him in the service of all or any of the associated organizations.)

He was asked:

> "Did you solicit any other kind of business for Christopher or any of its subsidiaries? A. Yes, I did.
>
> Q. Well, did you secure orders for Christopher or any of its subsidiaries or National Aircraft for hinge horns?
>
> A. No, I did not secure any orders for them.
>
> Q. Did you attempt to secure such orders? A. I had orders reinstated for them. I did not attempt to secure any orders. That was not in my division." (R. 46).
>
> Q. Did the Christopher Company or its subsidiary National Aircraft Company have a great number of contracts for the manufacture of hinge horns? A. They did." (R. 46).

In the same deposition Magidson was asked what kind of business he had solicited and he answered:

> "A. I solicited the manufacture of anything that could be made in the plants of the Christopher Engineering Company and their subsidiaries." (R. 46).

As further evidence of the factual relationship of the several organizations to each other and the factual relationship of Magidson to all of them, the petitioner put

in evidence a return to an order to show cause filed by Magidson in the Missouri Supreme Court (Duggan vs. Kirkwood, Judge, 357 Mo. 325) a mandamus proceeding brought by the trustee in the Supreme Court of Missouri to secure entry into the suit pending in the state court. In form a proceeding against the Judge of the St. Louis Circuit Court, under the Missouri practice the action was defended by the party to the proceeding involved, in this case by respondent Magidson.

The return was offered by the trustee and received, not as evidence of a valid judgment, but as an admission by Magidson having the nature of evidential estoppel, of the factual relationship of the several business organizations. The return incorporated a purported judgment order of the Circuit Court in the so-called Dubman case. The purported judgment order (R. 114) in terms adjudges all the capital stock of the National Aircraft Company, ostensibly acquired by Brown and Christopher, to be the property of the Christopher Engineering Company, and adjudges Christopher Engineering Company to be the owner of all the businesses conducted by Brown and Christopher under various names.

Magidson's Perjury.

In the course of the hearing of the instant case before the trial court Magidson admitted he personally fabricated a purported original carbon copy of a purported resignation dated June 15, 1943, (Deft. Ex. 4-R. 49-189) to establish that he had resigned his employment a month before he finally consummated his joint venture with the Schneiders and with knowledge of its falsity identified it under oath (R. 166) as an original carbon copy. It was proved by a watermark that the paper on which the carbon copy was written had been first manufactured some three years after June 15, 1943. (R. 189). Magidson confessed his perjury and fraudulent fabrication of evidence. (R. 218, Et Seq.).

There was also offered in evidence as an admission against interest by Magidson a petition (PX 74-R 55-

152) filed by him in the State Court against Christopher Engineering Company, a corporation, J. M. Brown and A. B. Christopher, doing business as Christopher Engineering and Manufacturing Company, also as Christopher Aircraft Company, and also as National Aircraft Company. Summons was issued in connection with this suit on September 2, 1943, returnable to the December Term, 1943.

The petition claimed of all the defendants an alleged indebtedness for wages and expenses and alleged:

> "Plaintiff further states that the above named defendants are for all intents and purposes one and the same company and organization."

The petition further alleged that Magidson was employed by the defendants from September, 1942, until July 24, 1943, and that during said time he worked for the said defendants (and) faithfully performed his said duties in essential war work.

Plaintiff again alleged that he worked every day, including Sunday, for the defendants from September, 1942 to July 24, 1943.

Hascal Schneider testified that at some time prior to March, 1943. [N. B. This was shortly after the conference at National (R. 85), attended by Magidson with a view of working the bugs out of the hinge horn program and after he had been furnished a list of National's customers for hinge horns (R. 38), and after he had submitted plans to corner the necessary bearings and procure a monopoly of the hinge horn business due to the perfection of forming of "our horns" (PX 42, R. 38-152)]. Magidson, at the same time began negotiating with Schneider and, representing himself to be an independent broker (R. 121-123), procured an arrangement for commissions on such business as he might procure for the Schneider company Seco-Lite, and Magidson told him that "hinge horns were a very good item to make because there was only one supplier, and I told him I did not know what the hinge horn was. He said the

National Aircraft Company was the only supplier." (R. 120).

Schneider further testified that because the tooling involved in making the hinge horns was expensive, he was reluctant to go into the business with Magidson, even though Magidson said he was thoroughly familiar with the methods of manufacturing hinge horns and could secure all the business necessary. (R. 121). "He told me he had seen the whole process by which the hinge horns were made. Evidently he meant he had seen this work done at National. (R. 121).

Schneider testified that before the joint venture quoted prices on hinge horns a rough estimate was made of the cost of producing these items.

"Magidson told me they were selling them for $9.75 each and that he thought we could get a lot of business at $8.00 apiece. "He said "they" were "National". (R. 122).

Mr. Magidson negotiated the purchase of the dies to make hinge horns. I don't know whether he made the actual drawings for the dies or not. He handled the procurement of the tools. I think the negotiations for the tools began either late in May or early in June." (R. 122).

Following these negotiations with the Schneiders an oral contract was entered into between them and Magidson under which Magidson agreed to furnish the customers, and the know-how, and Seco-Lite was to furnish the capital and in their shop to manufacture hinge horns and divide the profits equally with Magidson. This oral contract was consummated on July 15, 1943, and formalized in writing by the parties on Nov. 23, 1943, (R. 62) on the advice of their tax attorney.

The contract was never modified and all the profits involved in this case were earned under the original contract (R. 124).

Under the arrangement between Magidson and Seco-Lite all the business of the joint enterprise which produced the

profits involved was conducted solely in the name of Seco-Lite Manufacturing Company, who (The Schneider partnership) supplied all the necessary capital. Magidson was to be paid one-half the net profits (PX 51, R. 62-152)

None of the extraneous facts recited by the Court of Appeals appeared in the record or were tried by the District Court.

SUMMARY OF ARGUMENT.

Question 1:

The opinion on its face indicates that the Court of Appeals erred and has departed from the accepted course of judicial procedure and has established a new equity.

The opinion on its face is impertinent to the issues and the compass of the appeal.

U. S. v. Hamburg-Amerikanische Co., 239 U. S. 466-476, 60 L. Ed. 387-390;

U. S. v. International Union United Mine Workers of America (CA D. C.), 190 Fed. (2) 865-872;

Sobel v. Whittier Corp. (CA 8), 195 Fed. (2) 361;

Elliott v. Thompson (CA 8), 185 Fed. (2) 527;

Trust Co. of Chicago v. Pa. R. Co. (CA 7), 183 Fed. (2) 640.

Question 2:

The Court erred in denying plaintiff relief for lack of record evidence that National was ever a subsidiary of Christopher Engineering Company and denying full faith and credit to the judgment admitting it to reorganization.

Duggan, et al, v. Sansberry, 327 U. S. 499, 90 L. E. 809;

Magidson v. Duggan (8th Cir.), 180 Fed. (2) 473;

Oglesby & Simpson Supply Co., et al, v. Duggan, (8th Cir.), 174 Fed. (2) 904;

State exrel Duggan v. Kirkwood, 357 Mo. 325, 208 S. W. (2) 257.

And disregarded record evidence disclosing an admission by the defendant of the unity of the several organizations involved amounting to evidentiary estoppel.

Holly, et al, v. Holly, et al, 75 Fed. (2) 13.

Question 3:

The Court erred in applying against the plaintiff a modified rule analagous to "clean hands".

Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co., 324 U. S. 806, 89 L. Ed. 1381;

Toomer v. Witsell, 334 U. S. 385-393, 91 L. Ed. 1460-1469;

National Labor Relations Board v. Fickett-Brown Mfg. Co. (5th Cir.), 140 Fed. (2) 883-884;

American Coop. Serum Assn. v. Anchor Serum Co. (7th Cir.), 153 Fed. (2) 907-912;

Columbia Gas & Electric Co. v. U. S. (CCA Ky.), 151 Fed. (2) 461-467;

Shaver v. Heller & Merz Co. (8th Cir.), 108 Fed. 821-834;

Knapp v. S. Jarvis Adams Co. (8th Cir.), 135 Fed. 1008-1010;

Trice v. Comstock (8th Cir.), 121 Fed. 620-627.

Question 4:

The Court erred and denied plaintiff a benefit as third party beneficiary of Magidson's employment contract with Christopher Engineering Co.

Restatement of the Law of Contracts, Vol. 1, Chapter 6;

Crone v. Stinde, 156 Mo. 262, 55 S. W. 863-864.

And erred in denying relief because Magidson as an employee of Christopher Engineering Company or

Brown and Christopher, themselves fiduciaries, was bound by the same obligation.

Iroquois Iron Co. v. Kruse (8th Cir.), 241 Fed. 433-442.

And a direct contract was not essential to a fiduciary relationship.

Trice v. Comstock, 120 Fed. 621-627.

Question 5:

The Court erred in denying plaintiff relief for lack of proof of actual damages.

Jackson v. Smith, 254 U. S. 586-589;

Magruder v. Drury, 235 U. S. 106, 59 L. Ed. 151;

Trice v. Comstock, 121 Fed. 620-623;

Meinhard v. Salmon, 249 N. Y. 458;

Irving Trust Co. v. Deutsch, 75 Fed (2) 121.

Question 6:

The Court erred in ruling that Magidson's fraud and perjury in the preparation and trial of his case amounted to nothing.

Allen v. U. S., 164 U. S. 492-499, 41 L. Ed. 528;

Waller v. U. S. (8th Cir.), 179 Fed. 810-813;

Broomfield, et al, v. Texas General Indemnity Co. (5th Cir.), 201 Fed. (2) 746-748;

B & O Rly Co. v. Rambo (6th Cir.), 59 Fed. 75-83;

Shawhan v. Shawhan Distillery Co., 195 Mo. App. 492, 197 S. W. 371;

Pomeroy v. Benton (Mo. Sup.), 77 Mo. 64-87.

Question 7:

The Court erred in initiating and trying without remand an issue not submitted to the lower court and usurped the jurisdiction of the court of original jurisdiction.

Schilling v. Schwitzer-Cummins Co. (CA D. C.), 142 Fed. (2) 82;

Crutchfield v. U. S. (CA Cal), 142 Fed. (2) 170-175;

Ralston Purina Co. v. Novak (8th Cir.), 111 Fed. (2) 631-634;

Stephenson, et al, v. Equitable Life Assurance Society (4th Cir.), 92 Fed. (2) 406-410;

Hall v. U. S. (CA Okla.), 78 Fed. (2) 168-170.

The Court of Appeals erred in undertaking to superintend the lower court beyond the compass of the appeal.

Lewis v. United Gas Pipe Line Co. (CA La.), 194 Fed. (2) 1005-1006;

Trust Co. of Chicago v. Pa. R. Co. (7th Cir.), 183 Fed. (2) 640-646;

See also cases cited under Question 1.

ARGUMENT.

Question 1.

Mr. Justice Frankfurter, in a concurring opinion in Western P. R. Corporation v. Western P. R. Corporation, 345 U. S. 247; 97 L. Ed. 986 (l. c. 272; 1001) indicates his faith in the ability of alert and experienced Judges to comprehend serious error in an opinion, even though they did not participate in the trial or the preparation of the opinion and had not read the record. We suggest that the instant opinion presents a fair opportunity to test that theory.

From the fact that the Eighth Circuit had only five acting Judges when it allowed to be filed petitioners' second motion for a rehearing in banc and overruled it by only a "controlling" vote (certified record), it may be inferred that one or more of the active Judges from the face of the opinion were understandably not persuaded of its propriety. The petitioners suggest that by merely reading the remarkable opinion this Court will probably be able to conclude it ought to be reviewed without the labor involved in a long investigation of the numerous errors and deviations from established procedure and settled equity.

The opinion is of great public importance because of its effect on appellate practice and its obvious conflict in so many instances with established rules of equity and with the law constituting it a court of review, and its effect on the administration of the Bankruptcy Law, that an adequate presentation of its startling rulings is calculated to require a petition, the mere volume of which is likely to impair its effectiveness and to impose on this Court's time.

The Court of Appeals has disregarded established equity or conscience and announced a novel theory that may not be reconciled with the settled rules of equity, which demonstrates that the Court, for some obscure reasons, is out of

sympathy with the established rules of equity affording a remedy for abuse of confidential relations and has rendered an opinion based on a personal conscience, and has written an opinion which, if admitted to the case law, will only result in vain litigation. It is inconceivable that its revolutionary conclusions of law and of what constitutes a judicial review will finally be accepted by a majority of the Courts and the bar.

The opinion cannot be reconciled either with established equity or accepted judicial procedure and the limitations of the authority of a court of review. In a proceeding by a trustee in reorganization to collect assets the Court proceeds sua sponte to a review of the judgment orders admitting the corporations involved to reorganization. From various sources dehors the record or on pure speculation it has concluded that the District Court either did not know what he was doing or allowed himself to be imposed upon. The Court recites (Appx. 15):

> "On the filing of the petition * * * but, so far as this record shows, without evidence or notice to anyone and without extending to the Bankruptcy Court in Indiana the courtesy of requesting a postponement of the sale * * * granted the petition."

The Court assigns no authority why the record in a collateral proceeding should contain these facts. The Bankruptcy Act does not provide for notice to anyone on the voluntary application of a debtor for reorganization and certainly the Bankruptcy Act does not undertake to provide a courtesy code, failure to observe which would render it improper for a trustee to sue a debtor to recover assets.

The Court of Appeals has applied a rule analagous to the "clean hands" doctrine, based, however, on acts not of the trustee, but of officers of the corporations whose estates he represents, and the inequitable acts cited have no relationship to any known equity of the defendant. In ruling on the equities of the case the Court has substituted for the factual or equitable relationship of confidence a relationship dependent upon direct contract between

the parties. For the equitable remedy of subrogation and constructive trusts the Court has substituted a proceeding for damages by requiring proof that the beneficiary suffered actual damage. In a case where a defendant admitted his fraud and perjury in the preparation of his case the Court has ruled that such fraud and perjury amounted substantively to nothing. In a case where, as a result of the lower court's ruling, that the insolvency or financial straits of the debtor was irrelevant and as a consequence no issue as to the financial situation of the debtors was tried in the lower court, the Court of Appeals, upon concluding that the insolvency of the debtors was relevant, has undertaken to determine that fact issue directly in the Court of Appeals and, in the absence of evidence in the record, has undertaken to determine that issue on speculation and on facts or assumptions of facts dehors the record. And, finally, the Court of Appeals determined that the petitioner ought not recover, not from the facts in the record, but on conclusions drawn by the Court of Appeals from matters dehors the record and from pure speculation.

And, disregarding the compass of the appeal, the Court has undertaken to supervise the District Court and gratuitously advise it with respect to impertinent matters foreign to the appeal.

Duty of Court of Appeals is limited to determine rights of persons or property which are actually controverted in the particular case before it and it is not empowered to decide new questions or abstract propositions or to declare for the government of future cases principles or rules of law which cannot affect the result as to the thing in issue in the case before it.

U. S. v. International Union United Mine Workers of America (CA D.C.), 190 Fed. (2) 865.

Eery judicial tribunal such as the Court of Appeals on appeal, has duty to decide actual controversies by a judgment which can be carried into effect and not to give opinions on moot questions or to declare rules of law which cannot affect the matter in issue before it.

Sobel v. Whittier Corp., (CA 8) 195 Fed. (2) 361.

Court of Appeals would decline to indulge in any unnecessary declarations of law on appeal.

Elliott v. Thompson, (CA 8) 185 Fed. (2) 527.

Court of Appeals cannot tell District Court ahead of time how to exercise its discretionary powers.

Trust Co. of Chicago v. Pennsylvania R. Co. (7th Cir.) 183 Fed. 2 640, 646.

We suggest that from the face of the opinion it appears that the Court of Appeals has departed from the usual and accepted course of judicial proceeding and that the opinion is so unfair and improper that this Court should review the same in the public interest and to rechart the proper course for the application of the established and accepted rules of equity procedure to the material facts in this record.

Question 2.

In a collateral proceeding prosecuted by a trustee against the defendant to recover assets by the remedy of a constructive trust, the Court of Appeals ruled:

> "There was, in our opinion, no adequate evidentiary basis for the findings of the district court that National was ever a subsidiary of Christopher Engineering. * * * That these corporations and the partnerships of Brown and Christopher were to all intents and purposes a single entity or enterprise. These findings, we think, are clearly erroneous." (Appx. p. 2●).

The subsidiary relationship of National to Christopher was adjudicated in the proceeding admitting National to reorganization as a subsidiary. Except insofar as it bore on the right of the petitioner to sue as trustee, the legal relationship of the Corporations was not relevant to the pending suit and inquiry and the Court of Appeals was foreclosed by the undisputed judgment. The jurisdiction of the district court to render that judgment has been adjudicated. Duggan, et al., v. Sansberry, 327 U. S. 499, 90 L. Ed. 809; Magidson v. Duggan (8th Cir.) 180 Fed. (2) 473; Oglesby & Simpson, et al., v. Duggan (8th Cir.), 174

Fed. (2) 904; State ex rel Duggan v. Kirkwood, Judge, 357 Mo. 325; 208 S. W. (2) 257.

The Court of Appeals in a collateral proceeding simply undertook to review on the facts the propriety of the judgment orders admitting the corporation to reorganization, and in the absence of facts reviewed them on speculation.

In any case, Magidson, who was neither a stockholder nor a creditor, was not entitled under the Bankruptcy Law to contest the reorganization proceedings even in a direct proceeding (11 USC Section 110) and his obligation to National as a fiduciary did not, in any event, depend upon the legal relationship between Christopher and National, but depended upon a factual relation of confidence to National a factual relationship which was substantially undisputed by the defendant and established by his own testimony.

> "Wherever one person is placed in such relation to another by the act or consent of that other, or the act of a third person or of the law, that he becomes interested for him, or interested with him, in any subject of property or business, he is prohibited from acquiring rights in that subject antagonistic to the person with whose interests he has become associated." Trice v. Comstock (8th Cir.), 121 Fed. 620; State ex rel Duggan v. Kirkwood, Judge, 357 Mo. 325; 208 S.W. (2) 257.

The case of Trice v. Comstock, et al, 121 Fed. 620, was announced in 1903 by Circuit Judges (Walter) Sanborn, Caldwell and Thayer of the Eighth Circuit and has never before been modified or overruled, expressly or by implication. The case was a Missouri case and is one of the most widely accepted announcements ever made by the Eighth Circuit and has been approved and cited by the Eighth Circuit on numerous occasions and by at least two of the Judges who concurred in the instant opinion. It was cited and approved in the cases of: Trustees Corporation v. K. C. M. & O. Rly Co., 18 Fed. (2) 765, Lewis, Stone and Symes, Judges; Davis v. Pearce, et

al, 30 Fed.(2) 85, Booth, Tyrell and Lewis, Judges; Heel, et al, v. United States, 33 Fed. (2) 489, Sanborn, Kenyon and Faris, Judges; Johnson v. Umsted, 64 Fed. (2) 316, Sanborn, Kenyon and Gardner, Judges; Winget v. Rockwood, 69 Fed. (2) 326, Gardner, Woodrough and Booth, Judges; First Trust Co. of Lincoln, Neb., v. Ricketts, 75 Fed. (2) 309, Sanborn, Gardner, and Woodrough, Judges; Burnes Natl. Bank v. Mueller-Keller Candy Co., et al, 86 Fed. (2) 252, Gardner, Sanborn and Faris, Judges.

It was also cited in the instant opinion but certainly was not followed, at least not as far as the source of confidential relations, the necessity of damages as a prerequisite for application of constructive trusts. The clean hands doctrine and every major question involved herein except the court's violation of the rules of judicial procedure.

The case of Trice v. Comstock is also cited as authority in Irving Trust Co. v. Deutsch (2d Cir.), 73 Fed. (2) 121, and by probably all of the sister Circuits.

Trice v. Comstock has been cited and approved by practically every state in the Union. Shepherd's Federal Citator lists at least thirty-seven states which have directly cited the case and the case has been cited in numerous other cases cited to the same point by the various states.

The case of Trice v. Comstock was adopted and quoted by the Supreme Court of Missouri in Exrel Duggan v. Kirkwood, Judge, 357 Mo. 325, and constitutes the local law involved in this proceeding. In view of its authority we have not thought it necessary to impose on the Court citations of the many cases which have approved and followed the case of Trice v. Comstock.

Insofar as the Court of Appeals in the instant case concludes that there was no evidence to support the lower court's finding that the businesses were to all intents and purposes one organization (Finding 10, R. 245), it will be noted that the Court of Appeals did not review the evidence on which the lower court based the last quoted

finding but based its finding on speculation. But the lower Court's finding was supported by Magidson's own testimony.

A petition filed by Magidson jointly against all the organizations in the Circuit Court of the City of St. Louis was offered in evidence and in that petition Magidson, in a suit purporting to claim unpaid wages, recited that he worked for all the organizations and

> "Plaintiff further states that the above named defendants are for all intents and purposes one and the same company and organization." (Plff's Exhibit 55, R. 74).

There was also offered in evidence by the plaintiff a return filed by Magidson to an order to show cause issued by the Supreme Court of Missouri on Duggan's petition for mandamus to procure entry to the suit pending between Magidson and the Schneiders for an accounting and distribution of the profits earned by the joint venture, the forerunner of the instant suit. The return incorporated a purported judgment of the Circuit Court of the City of St. Louis, adjudging to the Christopher Engineering Company the businesses of the so-called partnerships of Brown and Christopher and all the stock of the National Aircraft Corporation recently acquired in the name of Brown and Christopher. (R. 114). The evidence was sufficient to establish that Magidson, when unity of the corporations served his purposes, claimed unity, and it is submitted that when conditions had changed so that it was to Magidson's interest to claim disunity, that Magidson was estopped by a species of evidentiary estoppel from claiming disunity. Holly, et al, v. Holly, et al, 75 Fed. (2) 13.

It is clear by the express ruling of the Court of Appeals that it denied relief to petitioner because, among other things, "there was no adequate evidentiary basis for the finding of the district court that National was ever a subsidiary of Christopher."

If the Court was referring to an assumed inadequacy of the evidence on which the Court admitted the corpora-

tions to reorganization (which seems obvious from the whole opinion), then the Court, contrary to established law and its constitution as a court of review, undertook in a collateral proceeding to review on the facts a final judgment of a court of undisputed jurisdiction, which of itself is of sufficient public importance to warrant the intervention of this Court.

In any event, the Court ruled that in an action by a trustee of a subsidiary debtor to collect assets relief must be denied unless evidence was offered sufficient to support the judgment admitting the corporation he represented to reorganization, as a subsidiary, which would impose on every trustee in bankruptcy who found it necessary to institute a suit to collect assets to prove in the suit to collect assets the facts necessary to establish the propriety of the judgment order admitting the corporation represented by him to reorganization.

The necessary effect of the ruling is to impair, if not destroy, the ability of a trustee in bankruptcy to collect the assets of the estate, or if the trustee found it necessary to file a number of suits to collect assets and had to submit the question to a multiplicity of courts or juries, the probable consequences would be that the trustees, by reason of the divergent findings of the several courts or juries, would be at one and the same time both authorized to collect the assets and not authorized to collect the assets. It may be readily perceived that the effect of such an interpretation of law would render the administration of estates under the Bankruptcy Act so uncertain as to destroy what has been called the broad and humane purposes of the Bankruptcy Act and warrant the intervention by this Court in the public interest.

Question 3.

The Court of Appeals, as the result of an ex parte inquiry, determined that the officers of the debtor and subsidiary debtor, their counsel and others, were guilty of inequitable conduct and concluded, presumably on the theory that courts "sit to do justice and not to do injus-

tice" (Appx. 22), that in some manner or means the misconduct referred to ought to be a defense against the case prosecuted by the trustee in reorganization.

Of course, even if true, the fact that the officers or the corporations were themselves impure and had committed inequity, it does not follow that the trustee in bankruptcy, who represents creditors by virtue of the title of a judgment creditor with a lien cannot recover. (11 USC, Sec. 110c). The Court does not undertake to apply any known rule of law in support of its action of charging the trustee with the inequities charged to have been committed by others.

The ruling vaguely suggests that the court was trying to apply to this case and against the trustee in bankruptcy the doctrine of "clean hands." But the equitable maxim of "clean hands" would not be applicable to a trustee who sued in the right of innocent creditors in any event, unless he is guilty of inequities in his representative capacity, and, that is doubtful. But in any case the maxim applies only to inequity or bad faith related to the matter in which the litigant seeks relief, however improper may have been the defendant's behavior otherwise.

Precision Instrument Manufacturing Co. v. Automotive Maintenance Machinery Co., 324 U. S. 806, 89 L. Ed. 1381;

Toomer v. Witsell, 334 U. S. 385, 92 L. Ed. 1460;

National Labor Relations Board v. Fickett-Brown Mfg. Co., (5th Cir.), 140 Fed. (2) 883-884;

American Coop. Serum Assn. v. Anchor Serum Co., (7th Cir.), 153 Fed. (2) 907-912;

Columbia Gas & Elec. Co. v. U. S. (CCA Ky.) 151 Fed. (2) 461-467;

Shaver v. Heller & Merz Co. (8th Cir.), 108 Fed. 821-834;

Knapp v. S. Jarvis Adams Co. (8th Cir.), 135 Fed. 1008-1010.

The principle that he who comes into equity must come with clean hands repels the complainant only when his wrongdoing consists of misconduct in the transaction respecting the equity which he seeks to enforce. Trice v. Comstock (8th Cir.), 121 Fed. 620-627.

The citation of authority might be extended indefinitely and we doubt if there is a single case in the reports, other than the instant case, where the court applied the rule of "clean hands" against a plaintiff where the misconduct was of parties not related to the action and the misconduct did not relate to or affect any equity of the defendant.

No matter how black the misconduct of the officers of the corporation, their misconduct did not license Magidson wrongfully to exploit the property of the corporation, and the application of the rule generally would convert legal proceedings into a scandal hunt.

Question 4.

The Court of Appeals assigned as one ground for denying relief to the petitioner that "Magidson never had any contractual or fiduciary relationship with National . . ." (Opinion p. 20)

It may be conceded that Magidson never had a direct contractual relationship with National. His direct contract was with Christopher Engineering Company (PX 1, R. 35-152) and under that contract he covenanted to be loyal to Christopher's clients and employers. Under the supervision of Brown and Christopher, officers of both Christopher Engineering and National Aircraft Company, he actually interested himself in National's business and undertook to promote its business and thereby became obligated to National, a third party beneficiary, under his contract with Christopher Engineering Company.

Restatement of the Law of Contracts, Vol. 1, Chap. 6;

Crone v. Stinde, 156 Mo. 262, 55 S. W. 863.

Brown and Christopher, common officers of both corporations, and managing each of them, were likewise fiduciaries

for each of them and Magidson, as their agent or employee, when he interested himself in the business of National, likewise became bound to National by the same ties which bound Brown and Christopher to them. Iroquois Iron Co. v. Kruse, 241 Fed. 433-442.

But, in any event, a contractual relation either by direct contract with National or as a third party beneficiary under his employment contract, or by virtue of his relationship to fiduciaries Brown and Christopher, is not essential to plaintiff's cause of action.

In Trice v. Comstock, 120 Fed. 621, the late Judge Walter Sanborn, quoting from the American Note to Keech v. Sandofer, 1 White & P. Leading Cases in Equity (4th American Edition, p. 62) (l. c. 627) said:

> "Wherever one person is placed in such relation to another by the act and consent of that other, or the act of a third person, or the act of the law, that he becomes interested for him, or interested with him, in any subject of property or business, he is prohibited from acquiring rights in that subject antagonistic to the person with whose interests he has become associated."

That Magidson, by his own consent and by the consent of Brown and Christopher, managing officers of National, did interest himself in the promotion of National's hinge horn program and learned its potentialities for profit is indisputable. Magidson, as a witness testified to facts showing that with his voluntary consent and with the consent of the common officers of all the organizations, he undertook to aid in National Aircraft Company's hinge horn program. He undertook to expedite the program by reinstating orders for it. (R. 37) He procured a list of its customers with the intent of producing business for it. (PX 42, R. 38-152). He undertook and procured for it bearings constituting a key to its whole program. (R. 38). He advised it how it might acquire a monopoly of the hinge horn business (PX 12, R. 38-152) based on the "perfection of the forming of our hinge horns." He spent at least a portion of his time about National's business in hinge horns (PX 9, 10,

R. 44-152). He had no previous experience with the hinge horn business. (R. 37) He was drawing $240.00 a week and expenses (it made no matter that he was being paid by Christopher). He was not interested in who paid his salary. (R. 44) He knew there was some connection between Christopher and the Company from which he actually received his salary. (R. 44) A few weeks after he was introduced to the National's hinge horn business he had recognized the potentialities for profit of the hinge horn business and without notice to his employers he undertook to interest the Schneiders in the subject matter of National's business, but solely for the private profit of himself. (R. 120) Having no previous experience in hinge horns (R. 37) he, while still drawing a salary from one of the organizations, so interested Schneider in organizing with him a competitive business, that Magidson himself arranged for the tooling to put the competitive business into operation. (R. 122) He had learned enough about National's business that he explained to Schneider that he was thoroughly familiar with the methods of making them (R. 121) while National was getting $9.75 each for the hinge horns, that they could be made at a profit at $8.00 (R. 122) and actually approached National's customers offering hinge horns for $8.00 each. (R. 99) While still employed and drawing a salary directly or indirectly for his activity in National's business he closed a contract with Schneider to go into competition with National and make and sell hinge horns and divide the profits equally with him. When caught up in litigation he conceived the idea that he could escape the consequences if he could establish that he had resigned before the Schneider negotiations were completed and to escape the consequences of his fraud he fabricated an ostensible carbon copy of an alleged resignation and perjured himself and identified the alleged carbon copy as an original carbon copy of a bona fide resignation.

Petitioners submit that limiting the equitable doctrine of constructive trusts to fiduciary relationships arising from direct contract would render equity helpless to redress unjust enrichment in numberless cases and negative equity's proud boast that it will not allow a wrong to be

without a remedy, and convert equity, from a court of conscience into a mere adjunct to courts of law.

The ruling of the Court of Appeals is in conflict with settled and established rules of equity and conscience and would have the effect of encouraging fraud and breach of confidence by fiduciaries, contrary to the settled policy of equity and warrants the intervention of this Court to review the opinion.

Question 5.

On page 20 of the Opinion the Court recites as one ground for denying petitioner a recovery:

> "The assets of the debtor corporations were deprived of nothing by Magidson's activities as a joint venturer that they were entitled to or could have obtained if he had never engaged in the joint enterprise with the Schneiders."

We suggest that the ruling of the Court is in conflict with all the controlling decisions and the established rules of equity and that the Court of Appeals has rendered a decision inconsistent with the rules of morality and with an ancient rule of equity, rarely disputed, and is in conflict with the opinions of this Court and the opinions of the several circuits, including the Eighth Circuit, and of all the state Courts that have passed upon the question. The matter is of great public importance, as the decision tends to destroy one of the basic principles of equity and deprives an employer or principal of the undivided loyalty of an agent or fiduciary at a time when such loyalty is most needed. Of course, in many instances the employer, for lack of skill or ability, is unable to operate at all by his own exertions yet, under the rule announced by the Eighth Circuit, he could not safely employ the services of a competent person. In passing, the Court of Appeals, in ruling that the misconduct must "frustrate" the purposes of the relation, has construed the words to mean that it must have frustrated some specific project which the employer contemplated. On the contrary, the phrase is "frustrate the purpose of the rela-

tionship." Of course National did not contemplate any operation with the Schneiders. Magidson was employed to promote the interests of his contractual employer and of its clients and employers and in the course of his employment factually interested himself in the business of National and its hinge horn program. Shortly after Magidson interested himself on National's behalf and upon discovering the potentialities of the hinge horn operation he, holding himself out as an independent broker, began secret negotiations with the Schneiders. Not to promote the purpose of his employment and for National's interest, but to promote a competitive operation for his own profit, in frustration of that purpose.

In Jackson v. Smith, 254 U. S. 586, this Court, in an opinion by the late Justice Brandeis, ruled that a fiduciary could not pursue a course likely to bring his interest in conflict with that of his principal and, in the particular case, said: (L. C. 589).

> "Since he did pursue it and profits resulted, the law made him accountable to the trust estate for all the profits attained by him and those who were associated with him in the matter, although the estate may not have been injured thereby." Citing as authority therefor Magruder v. Drury, 235 U. S. 106, 59 L. Ed. 151.

In the case of Trice v. Comstock, 121 Fed. 620, the Eighth Circuit, in an opinion by the late Walter T. Sanborn, which was adopted by the State of Missouri in a prior ruling, in the pending case (Ex rel Duggan v. Kirkwood, Judge, 357 Mo. 325, 208 S. W. (2) 257), said,

> "One may enforce the trust which arises under this rule of law, although he sustain no damage. * * *" (p. 623).

Judge Cardozo, in the case of Meinhard v. Salmon, 249 N. Y. 458, said, when denying a request to determine

whether or not the beneficiary was actually damaged by the fiduciary's wrongdoing:

> "Such a calculus of probabilities is beyond the science of chancery."
>
> The standard of loyalty for those in trust relations is without the fixed divisions of a graduated scale."

In Irving Trust Co. v. Deutsch, 2 Fed. Supp. 971, the District Court for the Southern District of New York, dismissed a bill by a trustee in bankruptcy against recreant fiduciaries and announced the novel rule based on a theory of "proximate cause" and "the realities of the situation" that directors of a corporation and their associates need not stay out of a field which the corporation was financially unable to enter LC. 991. On appeal (Irving Trust Co. v. Deutsch, 73 Fed. (2) 121), the appellate court overturned the novel ruling of the District Court on the authority of Jackson v. Smith, 254 U. S. 586, 65 L. Ed. 418; Wing v. Dillingham, 239 Fed. 54 (CCA 5); Trice v. Comstock, 121 Fed. 620 (CCA 8) 1 and numerous other cases, and in a subsequent appeal by the trustee ruled the debt arising from the misconduct of a fiduciary was not dischargeable in bankruptcy. (In re Hammond, 98 Fed. (2) 703).

Citations of cases might be extended indefinitely, supra. We have found no cases where an appellate court has announced a rule which made the beneficiary's right to recover by constructive trust a fiduciary's unjust enrichment depend in any degree upon the question of actual damages suffered by the beneficiary.

We submit that the tendency of the ruling of the Court of Appeals in this case is to encourage fraud and disloyalty by confidential agents and is of such importance to the public generally that prompt steps should be taken by this Court to remove the decision from our Federal case law as an authoritative statement of the moral views of courts of equity.

Question 6.

Prior to the trial Magidson called on the plaintiff to produce an original of a letter of resignation purportedly written by him on June 15, 1943 and mailed by him to his contractual employee (R. 49). Upon being advised that the plaintiff could not find and had no record of such a document, Magidson took the witness stand. In the course of the hearing Magidson produced what appeared to be a carbon copy of a pen written document (R. 49) dated June 15, 1943, purporting to terminate his employment by resignation as of July 10, 1943. The defendant testified that the document he had produced and identified was in fact an original carbon copy of a pen written letter prepared by him at the date thereof simultaneously with the original resignation and with the same impression of the pen (Defendant's Exhibit 4—R. 167) and further testified in detail how he had placed such purported copy under a flap of a certain brief case on June 15, 1943, where it had ever since remained until removed and delivered to his attorneys for his use in this trial. (R. 167).

Subsequently the defendant offered it in evidence as defendant's Exhibit 4 (R. 189) and thereafter the plaintiff, by witness, one George Swett, established that the carbon copy could not have been prepared on June 15, 1943, because the paper bore a water mark which was not developed and used until February, 1946. (In view of defendant's later admissions concerning this fraud and perjury, the appellant did not, in the record, set out witness Swett's testimony at length.) (R. 189).

Following the testimony of witness Swett, defendant Magidson was put back on the stand in his own behalf (R. 218) and acknowledged that he had prepared the so-called original carbon copy some time in the early part of 1947 (R. 220) after the trustee had endeavored to intervene in the suit then pending in the Circuit Court of the City of St. Louis (R. 219). This suit then pending between Magidson and the Schneiders was the forerunner of the instant case.

The fraud and perjury was not the result of a sudden impulse. It was obviously the result of thought and deliberation expended by Magidson in its preparation for the calculated purpose of being offered in evidence in this trial. In its preparation Magidson necessarily wrote an original and the fact that he preserved the carbon, rather than the original, indicates that his deliberate purpose in fabricating the carbon was to offer it in evidence in support of his defense in the belief that if he could have established that he had resigned prior to finally consummating the agreement with the Schneiders, the terms of the employment contract could not be imposed on him in the case on trial. Obviously his testimony was not a casual and unconsidered act but, on the contrary, was an act which indicated careful preparation and execution for the purpose of perpetrating a fraud upon the trial court on what he believed to be a material issue, and it was only by his inadvertence in using for his purposes a paper which could not have been in existence on June 15, 1943, its date, that Magidson's fraud and perjury was not successful. It was only when he was caught up that he resolved to admit his perjury and fraud. (R. 219 et seq.).

In this connection the lower court found that Magidson was guilty of fabricating evidence and swearing falsely on the trial for the purpose of imposing upon the Court and opposing party a feigned defense. Said the Court:

> "It is an established and general rule that the acts and conduct of a party to the litigation is relevant to the main issue and the very equity of his case and it is well established and is in accordance with and by analogy is coexistent with the well established rule that a presumption arises that his case is unjust and he knows it, where a party in litigation finds it necessary to present untruthful evidence or to conceal facts within his knowledge or to spoliate or suppress or fabricate evidence".
>
> "The rule is well stated in Wigmore on Evidence, 2d Ed. Section 278, page 566:

> 'It has always been understood, the inference is one of the simplest in human experience, that a party's falsehood or other fraud in the preparation and presentation of his case, his fabrication or suppression of evidence by bribery or spoliation, and all similar conduct, is receivable against him as an indication of his consciousness that his case is a weak or unfounded one, and from that consciousness may be inferred the fact itself of the causes lack of truth and merit. The inference thus does not apply itself necessarily to any specific fact in the cause, but operates, indefinitely though strongly, against the whole mass of alleged facts constituting his cause.' "

Magidson did not in his points for reversal (R. 270) assign either the Court's findings or conclusions re perjury as error.

The Court of Appeals, however, sua sponte reviewed the lower court's findings and conclusions as to the facts and law and disposed of Magidson's admitted perjury by saying (Appx. 22):

> "It is of course elementary that the testimony of a witness who wilfully testifies falsely may be disregarded unless corroborated by credible evidence—but the giving of such false testimony is substantive proof of nothing."

The Court of Appeals cited as authority for its conclusion four cases:

> Bunt v. Sierra-Butte Gold Mining Co., 138 U. S. 483-485—34 Fed. 1031);
>
> Moore v. Chesapeake & Ohio R. R. Co., 340 U. S. 573, 95 L. Ed. 547;
>
> Pratt v. Shell Pet. Co., (10th Cir.) 100 Fed. (2) 833-837;
>
> Ellis v. U. S. (8th Cir.) 138 Fed. (2) 612.

Reference to the cases cited shows none of them ruled on fraud or perjury by a party to a suit. It was a mere

witness who swore falsely and that the conclusions of the Courts of Appeals dealt merely with a question of perjury by a third party without the concurrence of a party to the action and did not consider at all the question of fraud and perjury in the preparation of his case by a party to the suit, on which the lower court ruled.

As quoted by the lower court, Wigmore in his treatise on Evidence, 2nd Edition, Section 278, page 566, states the rule as follows:

> "All authorized attempts to suppress testimony of the other party, are clearly admissable, and are evidence that in such party's own conviction his case will not bear full examination. They show a consciousness in such party of the weakness of his own cause."

The Court of Appeals disregarded cases dealing with fraud or perjury by a party to the suit.

Waller v. U. S. (8th Cir.), 179 Fed 810-813;

B. & O. Railway Co. v. Rambo (6th Cir.), 59 Fed. 75, L. C. 83;

Broomfield, et al. v. Texas General Indemnity Co. (5th Cir.), 201 Fed. (2) 746, and the authorities cited in the last named case, together with the case of

Shawhan v. Shawhan Distillery Co., 195 Mo. App. 492; 197 S. W. 371;

Pomeroy v. Benton (Mo. Sup.), 77 Mo. 64-87,

all holding in effect that fraud and perjury by a party to an action in the preparation and trial of a cause constitutes an admission of guilt applicable to the whole case and of course the Court of Appeals disregards the numberless cases inferring guilt from flight and similar acts held to raise an inference of guilt.

The applicable rule does not depend solely upon the authority of secular law, but has its foundation in Holy Writ.

> "The wicked flee when no man pursueth; but the righteous are bold as a lion."
>
> Proverbs 28, verse 1, King James version.

In Allen v. U. S., 164 U. S. 492, 41 Ld. 528, this Court said, in overruling an objection to an instruction in a criminal case where the jury was informed that it should disregard fabricated evidence because it is worthless:

> "And if it is purposely and intentionally invoked by the defendant it is evidence against him; it is the basis for a presumption against him because the law says that he who resorts to subornation of perjury to accomplish his end, this is against him, and you may take such action as the basis of a presumption of guilt." L. C. 498

Said this Court in overruling an objection to the instruction:

> "(This) is but another method of stating the principle that the fabrication of testimony raises a presumption against the party guilty of such practice." (Citing authorities) L. C. 499

Petitioners submit that in the circumstance the defendant was charged with an offense against morals and deliberately fabricated evidence and perjured himself in an attempt to escape the consequences, that such fact is evidence of a consciousness of guilt, in civil as well as criminal cases, and for a court to deny all evidentiary effect of such fraud and perjury and to find him innocent, as a matter of law, when he himself in effect admits his guilt, runs counter to all human experience, and is calculated to lower public respect for the courts and judicial proceedings.

And petitioners urge that the Court of Appeal's conclusion with respect to the effect of perjury and fraud in the preparation of his cause by a party to an action is now, as never before, of peculiar public importance.

The American and English Common Law and judicial processes for the resolution of facts is wholly dependent upon the conception that parties and witnesses will respect

their oaths and tell the truth. To repeat, our entire judicial procedure for developing facts is based upon the conception that parties and witnesses can be relied upon to respect their oaths and tell the truth. Superstitious regard for an oath is probably extinct and religious sanctions for an oath are at an all time low and appellee submits that any judicial ruling that accepts with complacency perjury by a party to a suit or softens the effect of perjury, strikes at the very root of administration of justice and lowers public respect for American judicial processes and American Courts is of peculiar public importance especially in this age when it appears from the public press and from statements openly made in the United States Senate, June 16, 1954 by Senator Hendrickson, Chairman of the Special Senate Committee (investigating Juvenile Delinquency), that, in a poll conducted by Fairleigh Dickinson College, among 2500 students, in 27 High Schools and including 1000 college students, that about 75% of those who participated in the poll "brushed aside lying and cheating as acts which are not considered delinquent", from which Professor Warren L. Duncan, who conducted the poll, said that the poll indicated that a large majority of the persons polled considered "that lying and cheating is a normal way of life."

In such situation petitioners submit that the courts to whom has been submitted the maintenance of our judicial processes should boldly stand up and be counted on the side of righteousness or, the only alternative is to find a substitute for our historical method of resolving facts.

Question 7.

The lower court concluded that the ability of defendant Magidson's employers to have made the profit involved by their own exertions was not material to the issues in an action involving unjust enrichment and accordingly that issue was not tried in the lower court and no competent evidence was received by the lower court or preserved in the record for the purpose of trying that issue.

The Court of Appeals, however, concluded that the ability of the employer to have made the profit was material and

that evidence of the financial situation of the employers was relevant as bearing on that issue, and in the absence of competent evidence in the record resorted to speculation and concluded on speculation that National Aircraft Company received its death blow on March 1, 1943, and that the Christopher Engineering Company succumbed as a going concern during the course of the so-called Dubman case pending in the state court in the summer and fall of 1943. (Appx. 20)

In so ruling the Court of Appeals fell into two errors of public importance.

First: By undertaking to initiate and try an issue not submitted to the lower court the Court of Appeals exceeded its own jurisdiction, (limited to the jurisdiction of a reviewing court) and usurped the jurisdiction of a court of original jurisdiction (28 USCA 1291).

> "It is not the function of an appellate court to assume the powers of a trial court."
>
> Schilling v. Schwitzer-Cummins Co. (C. of A. D. C.), 142 Fed. (2) 82.
>
> "The Circuit Court of Appeals is an appellate court with a function of considering and rectifying errors of the trial court."
>
> Crutchfield v. U. S. (CA Cal.), 142 Fed. (2) 170-175.
>
> "The Circuit Court of Appeals is a court of appellate jurisdiction and its functions are limited to the review of alleged specific erroneous rulings of the lower court."
>
> Ralston Purina Co. v. Novak (8th Cir.), 111 Fed. (2) 631-634.
>
> "Powers of a Circuit Court of Appeals are solely those of an appellate court and court can pass on merits of cause only by way of review.
>
> Stephenson, et al, v. Equitable Life Assurance Society (4th Cir.), 92 Fed. (2) 406-410.

"Jurisdiction of Circuit Court of Appeals is purely appellate and they have no original jurisdiction except such as is necessary to aid and enforce their appellate jurisdiction."

Hall v. U. S. (CA Okla.), 78 Fed. (2) 168-170.

"The Court of Appeals has no general superintendence over district courts and cases in them and may interfere only when and to the extent the laws provide."

Lewis v. United Gas Pipe Line Co. (CA La.), 194 Fed. (2) 1005-1006.

Even if the financial situation of the corporations involved had been material, that issue not having been tried in the lower court, the Court of Appeals could not, under its constitution as a court of review, initiate and try that issue directly in the Court of Appeals and conclude that the corporations were insolvent and deny petitioner relief without conflicting with the petitioner's right under the Fifth Amendment to the Constitution of the United States to be heard and offer evidence on that issue, and it would necessarily follow that the Court of Appeals, in determining that issue, without affording and without being able to afford the petitioner a hearing on the factual issue, accordingly denied petitioner his constitutional right to a hearing in accordance with established procedure.

Second. The issue not having been tried in the lower court, the Court of Appeals necessarily arrived at its conclusion either on mere speculation or on evidence derived from sources other than the record, and reference to the opinion indicates that it did base its conclusion on assumed facts derived from sources other than the record.

In so doing the court exceeded its jurisdiction and proceeded in a manner contrary to the usual and accepted course of judicial procedure.

The Court of Appeals must be controlled in its decisions solely by facts contained in the record, unless relating to matters of which the Court might properly take judicial notice.

U. S. v. Van Deusen (8th Cir.), 78 Fed. (2) 121-122.

"Points which were not a part of the record before district court were not properly before court of appeals.

Brooks v. Woods (CA Cal.), 181 Fed. (2) 716-717.

"Matter appearing as an appendix to appellee's brief would not be considered if it was not incorporated in the record on appeal."

Petition of Rudder, et al, (CA NY), 159 Fed. (2) 695-696.

"Reviewing court cannot draw conclusions by speculation where data necessary for certainty was not given in trial court."

Riley v. Titus, 190 Fed. (2) 653-655.

"The Circuit Court of Appeals does not base its decision on alleged facts adduced in another case."

Phillips Petroleum Co. v. Johnson (CA Texas), 155 Fed. (2) 185-195.

The opinion of the Court of Appeals indicates that only a few paragraphs of the opinion are devoted to reviewing the case tried in the lower court on issues and facts submitted to and tried by the lower court and on evidence preserved in the record, while, on the contrary, most of the opinion is devoted to a review of alleged issues initiated by the Court of Appeals and tried on facts de hors the record and alleged records in other cases which to narrate would unduly extend this argument but that the Court of Appeals did so proceed is apparent from a mere inspection of the opinion which, as printed, amounts to 24 pages.

It is submitted that it is a matter of great public importance that courts be strictly limited to their statutory and acceped jurisdiction and that when a court proceeds, as indicated by the opinion herein, to exercise the jurisdiction of a trial court and in so doing deprives a party of his constitutional rights to a hearing, that the matter is of such importance that this court should intervene.

CONCLUSION.

Petitioners respectfully submit that the opinion of the Court of Appeals, on its face, demonstrates that the Court of Appeals, in reviewing petitioners' suit against the defendant to recover assets, departed from the usual and accepted course of judicial proceedings and in so many instances the decision conflicts with the settled rules of equity and the Court so exceeded its own jurisdiction that the presentation of the subject matter to this Court, with reasonable consideration to the time of this Court, has been rendered exceedingly difficult, and petitioners urge the Court that the proceeding is one in which this Court should intervene in accordance with the suggestions of the petitioners.

Respectfully submitted,

E. M. Munger,
Of Counsel.

GEO. O. DURHAM,
SHERMAN LANDAU,
Attorneys for Petitioners.

APPENDIX.

Judgment.

(Caption Omitted)

These causes came on to be heard or the record from the United States District Court for the Eastern District of Missouri, and were argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the judgments of the said District Court appealed from in these causes be, and they are each hereby, reversed with costs; and that Phil Magidson have and recover against Jerome F. Duggan, Trustee of the Estate of Christopher Engineering Company, a corporation, Debtor, and of National Aircraft Corporation, a corporation, Subsidiary Debtor, and Hascal Schneider and Max Schneider, Doing Business as Seco-Lite Manufacturing Company, the sum of One Thousand Three Hundred Thirty and 88/100 ($1,330.88) Dollars for his costs in this behalf expended, to be collected according to law.

And it is further Ordered and Adjudged by this Court that these causes be, and they are hereby, remanded to the said District Court with directions (1) to dismiss with prejudice, (2) to cause to be refunded to the State Court the entire fund taken from its custody, and (3) to permit no further interference by Duggan, Trustee, with the State Court proceedings to which the Schneiders and Magidson are parties.

May 11, 1954.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 14,653.

Phil Magidson,
Appellant,
vs.
Jerome F. Duggan, Trustee of the Estate of Christopher Engineering Company, a Corporation, Debtor, and of National Aircraft Corporation, a Corporation, Subsidiary Debtor, and Hascal Schneider and Max Schneider, Doing Business as Seco-Lite Manufacturing Company,
Appellees.

Appeal from the United States District Court for the Eastern District of Missouri.

No. 14,688.

Phil Magidson,
Appellant,
vs.
Jerome F. Duggan, Trustee of the Estate of Christopher Engineering Company, a Corporation, Debtor, and of National Aircraft Corporation, a Corporation, Subsidiary Debtor, and Hascal Schneider and Max Schneider, Doing Business as Seco-Lite Manufacturing Company,
Appellees.

Appeal from the United States District Court for the Eastern District of Missouri.

[May 11, 1954.]

Orville Richardson (Max Sigoloff and James D. Dockery were with him on the brief), for Appellant.

George O. Durham (B. Sherman Landau and Noah Weinstein were with him on the brief), for Appellees.

Before SANBORN, JOHNSEN, and COLLET, Circuit Judges.

SANBORN, Circuit Judge.

These appeals are from two judgments entered in an action brought on March 17, 1949, by Jerome F. Duggan, Trustee of the Estate of Christopher Engineering Company, a corporation, Debtor, and of National Aircraft Corporation, a corporation, Subsidiary Debtor, in reorganization under Chapter X of the Bankruptcy Act, 11 U.S.C.A. §501 et seq., against Hascal Schneider and Max Schneider, doing business as Seco-Lite Manufacturing Company, and Phil Magidson, to recover, for the estates of the debtors, Magidson's one-half interest in the profits of a joint venture in which Magidson and the Schneiders had engaged. The action, a plenary suit in equity, was brought in the reorganization court.

The trustee Duggan in his complaint alleged that on July 1, 1942, defendant Magidson entered the employment of the Christopher Engineering Company as a skilled and confidential employee under a written contract of employment, copy of which was attached to the complaint; that Magidson abandoned his employment on or about August 1, 1943; that in the course of his employment Magidson was assigned to and rendered service in connection with the business of various associates and subsidiaries of the Christopher Engineering Company, including National Air-

craft Corporation, during which he acquired full knowledge of the business of his employer, its associates and subsidiaries, including "manufacturing processes, costs and prices and the names and requirements of its customers and of its trade lists and business information generally"; that as an equitable incident to his employment and by the terms of his contract Magidson occupied toward Christopher Engineering Company and toward its employees, customers, associates, and subsidiaries, a position of trust and confidence analogous to that of an equitable trustee, and that by the terms of his contract he was prohibited from reaping any secret profit or advantage therefrom; that nevertheless Magidson during the course of his employment and while bound by the terms of his contract secretly entered into a joint venture with Hascal Schneider and Max Schneider, doing business as Seco-Lite Manufacturing Company (hereinafter referred to as "the joint venture"), on or prior to July 15, 1943, and in the prosecution of the joint venture used the skill and knowledge derived by him as the result of his employment by, and in connection with the business of, Christopher Engineering Company and its associates and subsidiaries without its knowledge or consent.

The trustee alleged that the joint venture of the Schneiders and Magidson earned profits in excess of $100,000, one-half of which ostensibly by the agreement of the joint venturers belonged to Magidson, but to which in law and equity plaintiff was entitled for the benefit of the estates of which he was trustee in reorganization, and that Magidson had received, on account of the net profits of the adventure, advances in the sum of $7,500, to which the trustee was entitled.

The complaint continued with the allegation that the defendants Schneiders had instituted an action in the Circuit Court of the City of St. Louis, Missouri, for a declaratory judgment against Magidson for the purpose of judicially determining the profits derived from the joint venture; that this action was then pending in the State court; and that the Schneiders had deposited $90,000 in the registry of the State court pending the determination of the litigation.

On the facts alleged, plaintiff asked for an order staying proceedings in the State court in the action between Magidson and the Schneiders and impounding the fund in the registry of the state court and requiring its transfer to the registry of the reorganization court; for judgment in favor of the trustee establishing his title to Magidson's share in the profits of the joint venture and enjoining Magidson from claiming or asserting any right, title or interest in the profits; and, on final statement of the account as between Magidson and the Schneiders, for judgment against Magidson for all advances theretofore received by Magidson from the operation of the joint venture, with interest from the dates received.

Magidson answered the complaint, denying in detail the allegations made against him, pleading affirmative defenses, laches, the Missouri five-year statute of limitations, estoppel, and waiver. The defendants Schneiders were permitted to withhold any pleadings until after the issues between the trustee and Magidson were decided, the issues between the trustee and Magidson having by consent of the parties been severed from those as between the trustee and the Schneiders.

In No. 14,653, the controversy as between the trustee and Magidson, all issues were resolved in favor of the trustee.

Judgment was entered for the trustee establishing his title, to the exclusion of Magidson, in all that portion of the undistributed profits of the joint venture to which Magidson was entitled under the agreement with the Schneiders, and against Magidson and in favor of the trustee for the aggregate of all distributions theretofore received by Magidson from the joint venture. The officer of the State court having possession of the fund deposited in the registry of that court in the action between the Schneiders and Magidson was ordered to forthwith deliver the fund to the clerk of the reorganization court. All further proceedings in the action pending in the State court were permanently enjoined. Magidson was permanently enjoined from claiming or asserting as against the Schneiders any right or interest in the impounded fund or in the undistributed profits of the joint venture with the Schneiders.

Magidson's motion to set aside the judgment of the reorganization court and for a new trial was denied. Magidson appeals from the judgment.

On the final determination of the issues as between Magidson and the trustee, the Schneiders filed an answer in the reorganization court, admitting that the trustee was entitled to one-half of the net profits of the joint venture with Magidson, but that the amount of the profits had not been determined, and requesting the court to state the account as between them and the trustee. Following the proceedings on this phase of the case (No. 14,688), judgment was entered ordering the clerk of the reorganization court forthwith to pay from the $90,000 on deposit in the court the sum of $43,861.09 to the trustee Duggan and the balance of the fund at the same time to the Schneiders. In this proceeding, in which profits of the joint venture for distribution were determined, the court refused to allow

Magidson to appear or to be heard. Magidson appeals from this judgment.

In his statement of points relied on appellant makes 45 assignments of error in the findings and rulings of the trial court, many of which are argued at length in the brief. But, in the view we take of the case, decision here turns primarily on the sufficiency of the evidence to establish the alleged relation between Christopher Engineering Company, a Missouri corporation, Christopher Engineering and Manufacturing Company, a partnership, and National Aircraft Corporation, an Indiana corporation. On this question the District Court made the following findings of fact:

"4. Early in the administration of the debtor's estate this Court ruled that certain business activities being conducted as 'Christopher Engineering and Manufacturing Company' and 'Christopher Aircraft Company', ostensibly copartnerships registered in the names of certain managing officers of the debtor, were in fact mere divisions, agencies or departments wholly owned by the debtor, the Christopher Engineering Company, and pursuant to said ruling the plaintiff, as the reorganization Trustee of the debtor, has long since taken over and is collecting and administering all the assets of said agencies or departments as assets of the debtor. The Court, having again reviewed the facts in the light of the evidence offered in this case, confirms its former findings and again finds that the ostensible copartnerships were mere wholly owned divisions, agencies or departments of the Christopher Engineering Company, debtor.

"5. All the stock of the National Aircraft Corporation, subsidiary debtor, was acquired on behalf of the debtor in December, 1942, and it was long since ruled by this Court to be a wholly owned subsidiary of the Christopher Engineering Company, debtor, and that ruling reviewed in the light of the evidence in this proceeding is hereby confirmed, and the Court further finds that the National Aircraft Cor-

poration 'Parts Division' and 'Hinge Horn Division' referred to in the evidence were mere agencies, divisions or departments of the National Aircraft Corporation.

"6. The Christopher Engineering Company, debtor, and its agencies and divisions aforesaid, together with various other agencies and divisions, reference to which is not pertinent to this inquiry, were in fact and to all intents and purposes one business entity and the National Aircraft Corporation, and its agencies and divisions, after the acquisition of its stock in December, 1942, were in fact wholly owned subsidiaries of the Christopher Engineering Company, debtor, and thereupon and thereafter the Christopher Engineering Company, its divisions, agencies and departments, and the National Aircraft Corporation, its divisions, agencies and departments, were operated in common by the officers of the debtor and became and were in fact to all intents and purposes one common business enterprise, * * *. * * *

"10. The Court finds that the defendant Phil Magidson well knew that the business of the principal and subsidiary debtors and their various departments and agencies, including the Christopher Engineering and Manufacturing Company, and the National Aircraft Corporation Small Parts Division and Hinge Horn Division, were to all intents and purposes one business, operated under the management and control of the officers of the Christopher Engineering Company and largely with the same staff of employees, of which the defendant was a part, * * *. * * *"

The immediate question is whether the findings of the District Court are clearly erroneous. The findings of fact of a trial court are clearly erroneous within Rule 52 of the Federal Rules of Civil Procedure, 28 U.S.C.A., when (1) not supported by substantial evidence, (2) contrary to the clear preponderance of the evidence, or (3) based upon an erroneous view of the law. *Aetna Life Insurance Co.* v. *Kepler,* 8 Cir., 116 F.2d 1, 5; *Kasper* v. *Baron,* 8 Cir., 207 F.2d 744, 748.

We turn to a consideration of the evidence on which the quoted findings are based.

The Christopher Engineering Company (hereinafter referred to as Christopher Engineering), was organized June 11, 1942, as a Missouri corporation with its principal place of business in St. Louis. Its stockholders were Joe Dubman, A. B. Christopher, and J. M. Brown.[1] It was authorized to engage in the business of engineering, designing, and planning for industrial organizations. It actually engaged in tool designing. It did not engage in manufacturing. On December 27, 1943, a petition for reorganization of Christopher Engineering under Chapter X of the Bankruptcy Act was filed in the United States District Court for the Eastern District of Missouri.[2] In January 1944 the charter of the Company was revoked by the State of Missouri.

Christopher Engineering and Manufacturing Company (hereinafter referred to as Christopher Manufacturing) was organized about October 1, 1942, by A. B. Christopher and J. M. Brown, stockholders and directors of Christopher Engineering, as a partnership engaged in St. Louis in the business of manufacturing jigs and fixtures for concerns engaged in manufacturing aircraft and gliders. It was not engaged in engineering or designing.

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[1]In the trial of this action neither Dubman nor Christopher appeared. Brown was present at the trial, but did not testify, although facts in dispute were within his knowledge. The reason for Brown's conduct is made apparent later in this opinion.

[2]This reorganization proceeding, which has been in progress for more than ten years, seems to have resulted chiefly in widespread and prolonged litigation. See *State ex rel. Duggan* v. *Kirkwood*, 357 Mo. 325, 208 S.W.2d 257; *In re National Aircraft Corporation; Duggan* v. *Sansberry*, 7 Cir., 149 F.2d 548; *Duggan* v. *Sansberry*, 327 U.S. 499; *Oglesby & Simpson Supply Co.* v. *Duggan*, 8 Cir., 174 F.2d 904; *Magidson* v. *Duggan*, 8 Cir., 180 F.2d 473; *United States* v. *Duggan*, 8 Cir., ... F.2d ..., decided March 9, 1954. The complaint in this action was filed March 17, 1949. Final judgments were entered March 4, 1952, and July 16, 1952.

National Aircraft Corporation (hereinafter referred to as National) is an Indiana corporation with its principal place of business at Elwood, Indiana, where it had a plant. It was a dealer in parts and appliances used in the construction of airplanes and gliders, in particular an appliance referred to in the evidence as a hinge horn, a part used in the assembly of gliders by various corporations engaged in their manufacture for the Air Forces of the United States. In December 1942 A. B. Christopher and J. M. Brown acquired all of the stock of National.[3]

In June 1943 Joe Dubman, one of the stockholders of Christopher Engineering, filed an action in a Missouri state court against Christopher Engineering Company, A. B. Christopher, J. M. Brown and J. M. Brown, Trustee, and A. B. Christopher and J. M. Brown doing business as Christopher Aircraft Company, as Christopher Tooling Company, and Christopher Engineering and Manufacturing Company, in which Dubman charged Brown and Christopher with wrongfully diverting the funds of Christopher Engineering into other operations and businesses. Dubman asked for an accounting and for the appointment of a receiver for Christopher Engineering Company. All the defendants in that action, in response to an order to show cause filed on June 24, 1943, alleged that Christopher Engineering was a corporation organized to engage solely in designing tools and equipment; that shortly after Christopher Engineering began business, it appeared that the business of designing would stop unless the corporation could

[3]Apparently National maintained a parts division and a hinge horn division referred to in the court's findings. The court's findings also referred to Christopher Aircraft Company, which was a partnership composed of A. B. Christopher and J. M. Brown. Neither its business nor the extent of its operations appears from the printed record on appeal.

arrange to build the designs which it created; that A. B. Christopher secured a contract to design and manufacture jigs and fixtures for National; that Dubman opposed the extension of the corporation's business to manufacturing; that therefore the individual defendants, Christopher and Brown, not being bound to the corporation by any contract for their exclusive services and with the consent of Dubman, undertook to engage in the manufacturing business on their own behalf and at their own financial risk. In this return the defendants further asserted that they were not obligated to refrain from competing with Christopher Engineering; that in fact they never competed with it but turned over to it all of the design work incidental to the manufacturing operations undertaken by them. This return was signed by George O. Durham as counsel for all defendants—in the instant case counsel for the trustee Duggan—and was sworn to by J. M. Brown.

The same defendants in an answer filed in the State court action on October 4, 1943, in which they were again represented by George O. Durham and B. Sherman Landau, as attorneys,—both appearing in the instant case as counsel for Duggan—denied that Christopher Engineering or Dubman, as one of its stockholders, had any right, legal or equitable, in the capital or earnings of any of the manufacturing operations carried on by Christopher and Brown with the knowledge of Dubman and "at their own risk and expense" and "in their own names and trade-names adopted by them in accordance with the law of the State of Missouri." In this State court proceeding a decree in favor of Dubman was entered on December 17, 1943, appointing the appellee here, Jerome F. Duggan, receiver of Christopher Engineering and requiring the defendants to account to Dubman.

On December 27, 1943, Christopher Engineering filed its petition for reorganization in the United States District Court for the Eastern District of Missouri. The petition was signed and sworn to on behalf of the corporation by A. B. Christopher, President. Noah Weinstein, George O. Durham and B. Sherman Landau were the attorneys for the petitioner. No capital stock of National was listed as an asset of the petitioner. The petition stated that the assets consisted of a claim against National for about $55,000 and a claim against Christopher Manufacturing for $40,000, and that the value of the total assets amounted to about $100,000, and liabilities to about $89,000. A balance sheet attached to the petition showed the capital stock of the petitioner to be $10,000, and that, aside from a bank overdraft of $267.18 and accrued taxes of $339.80, total indebtedness consisted of $88,681.11 owed Christopher and Brown either as individuals or as partners in Christopher Manufacturing. It therefore appears that on December 27, 1943, no claim was being made that Christopher Engineering owned any part of National.

The District Court approved the petition of Christopher Engineering for reorganization on the day it was filed, appointed Duggan trustee, enjoined further proceedings in the State Court in the case of *Dubman* v. *Christopher Engineering Company, et al.*, and enjoined Duggan, as receiver appointed by the State Court, from interfering with the property of the debtor in the hands of Duggan, as trustee appointed by the Federal District Court in the reorganization proceeding.

On January 18, 1944, the reorganization court entered an order requiring Christopher, Brown and Landau to turn over to Duggan, trustee, the shares of capital stock of

National held by them. The order contained the following provision:

"It is Further Ordered, Adjudged and Decreed that A. B. Christopher, J. M. Brown or B. Sherman Landau, or any other person, firm, or corporation may file a claim for all or any part of said stock as owner, or to assert any interest or lien against said stock hereinbefore mentioned, by February 25th, 1944, next, which claim or lien shall not be affected by the delivery of possession to the Trustee under this Order."

The stock of National was delivered to the trustee, and on February 25, 1944, Brown and Christopher filed claims for its return. In Brown's claim, which was sworn to by him, he stated that he was "the sole and absolute owner" and entitled to the immediate possession of 288½ shares of the capital stock of National, subject to a lien of B. Sherman Landau in the principal sum of $6,000. Brown asked the court to direct the trustee to deliver to Brown the shares of stock. The claim of Christopher, filed on the same date, stated that he was the owner and entitled to the possession of the other 288½ shares of the outstanding capital stock of National that he had turned over to the trustee, and he asked for its return. Christopher swore to the truth of this claim. Landau, on the same date, also filed a verified claim, asserting that he had a $6,000 lien on the 288½ shares of the capital stock of National belonging to Brown.

Duggan, trustee, after receiving the capital stock of National, took over the assets of Christopher Manufacturing, and on February 25, 1944, Christopher and Brown filed a petition for the return of these assets. In their petition they asserted that they had formerly engaged in business as partners under the names of "Christopher Engineering and Manufacturing Company", "Christopher Air-

craft Company", and "Christopher Tooling Company"; that on January 20, 1944, they had been directed by the reorganization court to turn over to the trustee Duggan the assets of these partnerships, subject to the further orders of the court and without prejudice to their filing a claim for the assets on or before February 25, 1944; that they complied with the order of the court and turned the assets over to the trustee, and that they are entitled to immediate possession of these assets. They asked that they be found to be the sole owners of the assets and entitled to their immediate possession, and that Duggan, trustee, be directed to deliver the assets to them.

National was adjudicated a bankrupt on February 7, 1944, upon an involuntary petition filed January 21, 1944, in the United States District Court for the Southern District of Indiana. That court appointed as receiver James C. Sansberry, who was subsequently elected trustee in bankruptcy. On April 6, 1944, the Referee in Bankruptcy ordered that a public sale of assets of National be held on April 20, 1944.

The first meeting of creditors of National was held on March 7, 1944, at Indianapolis, Indiana. Brown testified at that meeting. A narrative statement of his testimony, so far as pertinent, appears in the record filed in this Court in the case of *Oglesby & Simpson Supply Co.* v. *Duggan*, 8 Cir., 174 F.2d 904. The statement reads as follows:

"Joseph M. Brown, being duly sworn, testified that he was a director, and Secretary and Treasurer of the National Aircraft Corporation, an Indiana corporation with its principal place of business at Elwood, Indiana; that the business of the corporation had been the manufacture of aircraft parts and gliders; that it owned real estate acquired in late 1941 or early 1942.

"That the corporation owned an old brick factory building, somewhere between forty and sixty years of age, for which the corporation paid between $10,000.00 and $12,000.00; that all of the stock of the National Aircraft Corporation had been purchased by Brown and by A. B. Christopher, each one owning 50% thereof; that the Articles of Agreement of the corporation provided for 500 shares but that 587 shares had been issued, and that this stock had been turned over to Mr. Duggan (Jerome F. Duggan), trustee of the Christopher Engineering Corporation, under court order.

"That litigation respecting the ownership of the stock had not yet been determined, that the Christopher Engineering Corporation was the subject of a separate bankruptcy proceeding pending in the Eastern District of Missouri.

"That the National Aircraft Corporation had one prime contract with the Government for building gliders, entered into in February, 1942; that the Government terminated that contract about February 20, 1943, approximately one month and twenty days after Messrs. Christopher and Brown acquired the stock of the corporation; that one glider had been delivered to the United States and that four others would have been delivered had it not been for cancellation.

"That Brown would not care to go on record as to how much money the Government had spent, but that the National Aircraft Corporation was indebted to the Government by reason of a certain revolving fund to the extent of $152,000.00 out of an original fund of $240,000.00.

"That as to the entire liabilities of the bankrupt, the figure '$429,000.00 would be pretty accurate,' that he would not care to estimate the reasonable value of the assets, that 'it looks to me like it (National Aircraft Corporation) is insolvent, but I would not care to express myself.'

"On further examination Joseph M. Brown testified that his stock was pledged with a Mr. Landau (B. Sherman

Landau) as collateral for a loan, and that Brown knew of no reason why the stock in his name and in Christopher's name should be regarded as the property of the Christopher Engineering Company; that he and Christopher had paid $30,000.00 cash for the stock."

On April 19, 1944, Brown, as Secretary of National filed a verified petition, ostensibly in its behalf, in the reorganization proceedings of Christopher Engineering, then pending in Missouri. The petition alleged that the majority of the voting capital stock of National "is owned directly by the debtor [Christopher Engineering] or indirectly through nominees," and that "This subsidiary corporation is unable to meet its debts as they mature, and it desires to effect a plan of reorganization in connection with the plan of corporate reorganization of the debtor." National, the so-called "subsidiary", prayed for the approval of its petition and for an order restraining Sansberry, the Indiana trustee in bankruptcy, from taking any steps affecting the assets of the "subsidiary", and directing him to turn them over to National or to a trustee to be appointed by the reorganization court. In the petition, the liabilities of National were stated to be about $90,000 and its assets to be about $150,000.

On the filing of the petition and "after hearing attorneys for said subsidiary corporation in favor of said petition," but, so far as this record shows, without evidence or notice to anyone and without extending to the bankruptcy court in Indiana the courtesy of requesting a postponement of the sale set for April 20, 1944, in order to afford the reorganization court in Missouri a reasonable opportunity to consider upon the merits National's petition for reorganization, the Missouri court, on April 19, 1944, granted the petition, found that National was a wholly owned subsidiary of Christopher Engineering, appointed Duggan

trustee, enjoined all further proceedings in the Court of Bankruptcy in Indiana, and ordered Sansberry, the Indiana trustee, to deliver the assets of the bankrupt to Duggan. Copies of the order of injunction issued by the Federal Court of Missouri were served upon Sansberry and the auctioneer immediately preceding the sale of National's assets under the order of the Bankruptcy Court in Indiana.

Instead of postponing the sale and seeking the vacation of the order of injunction in the reorganization court in Missouri, Sansberry carried out the order of the Bankruptcy Court in Indiana and consummated the sale. This resulted in the jurisdictional controversy which is described and decided in *Duggan* v. *Sansberry,* 327 U.S. 499. The Circuit Court of Appeals for the Seventh Circuit, in that controversy (*In re National Aircraft Corporation; Duggan* v. *Sansberry,* 149 F.2d 548), had held, in substance, that the Missouri Court had not obtained jurisdiction over National, because (1) National had not been shown to be a subsidiary of Christopher Engineering, (2) National had been adjudicated a bankrupt in Indiana and its assets had been transferred to a trustee, and (3) the petition of National for reorganization filed in Missouri did not show that Brown had been authorized to file it. The United States Supreme Court ruled, in effect, that regardless of whether the petition of National in the reorganization proceeding in Missouri had been properly or improperly filed and approved, the order of the Missouri Court was not subject to collateral attack in the bankruptcy proceedings in Indiana, because of §513, Title 11 U.S.C.A., which authorized the granting, pending approval or dismissal of a petition for reorganization of a debtor corporation, of a temporary stay of a prior bankruptcy proceeding.

The jurisdictional controversy between Duggan, trustee, and Sansberry, trustee, was decided by the Supreme Court March 4, 1946. 327 U.S. 499. On April 19, 1947, a number of the general creditors of National filed a petition in the Missouri reorganization proceeding for the dismissal of those proceedings in so far as they affected National as a so-called subsidiary of Christopher Engineering, and for a direction that the interrupted bankruptcy proceedings in Indiana be proceeded with. The grounds upon which the petition was based are stated in the opinion of this Court in *Oglesby & Simpson Supply Co.* v. *Duggan*, 8 Cir., 174 F.2d 904, 906.

The petition of the creditors showed that, while Brown in his verified petition for reorganization filed on behalf of National on April 19, 1944, had stated that its liabilities amounted to $90,000 and its assets to $150,000—and on March 7, 1944, had testified that its liabilities were about $429,000 and its assets $156,569.49—the report of the Indiana Referee in Bankruptcy showed general claims of $386,-015.74 and the total amount of all claims to be $2,430,094.61, and that the books of National showed assets of about $110,000. In the *Oglesby & Simpson Supply Co.* case (174 F.2d 904), the testimony of Duggan, taken on April 23, 1948, was that he did not know when Christopher Engineering ceased business, but that it had not operated as a going concern since he took charge; that, so far as he knew, its business was designing aircraft for the War Department; that he understood that the business of National was making planes; that he did not think that Christopher Engineering could go back in the aircraft business; that he did not know about National; that he had prepared no plans for the reorganization of either debtor; that he had about $500 in cash in the Christopher Engineering estate together

with some machinery "ranging anywhere from $1500 to $3500" in value; that he had claims that were then "in the process of trying to be collected aggregating * * * in the neighborhood of $125,000"; that during the last several years he had had disbursements but no receipts from Christopher Engineering; that he had about $30,000 in National funds, a lease bringing in around $13,000 or $14,000 a year from property appraised by him at $200,000, and claims "in the process of collection aggregating possibly another $200,000."

On September 30, 1948, the reorganization court, without opinion, denied the petition of the creditors of National for the dismissal of the petition for its reorganization and for a direction that National be liquidated as a bankrupt in Indiana. The creditors appealed. In an opinion filed June 6, 1949, this Court held, in effect, (*Oglesby & Simpson Supply Co.* v. *Duggan,* 8 Cir., 174 F.2d 904) that it was never intended that hopelessly insolvent corporations might invoke the provisions of Chapter X of the Bankruptcy Act; that it was apparent that National at the time of the filing of its petition for reorganization was hopelessly insolvent; that there was nothing in the record to indicate any reasonable hope or possibility of reorganization, but that the Missouri District Court had acquired jurisdiction of National and "if that estate is to be liquidated we may assume that the court, if and when it becomes satisfied that reorganization is not feasible, will direct the estate to be liquidated, not in the Indiana court but in the Missouri court." This Court also said in that case (page 907 of 174 F.2d):

"* * * The preferred claims far exceed the value of the assets and hence appellants could profit nothing by the granting of their motion. The entire estate will be absorbed in the payment of the costs of administration and of the

preferred claims. It can therefore be no concern of appellants whether the estate be administered in the Missouri court or in the Indiana court as the proof shows conclusively that they cannot in any event recover anything on their general claims. In these circumstances we think it was within the discretion of the trial court to deny their motion because they had no interest in the subject matter and no possibility of recovering anything out of the estate.

"Whether those holding preferred claims might seek liquidation of the estate we are not called upon to decide. * * *"

This Court, in effect, sustained the contentions of the creditors of National that liquidation was in order, but held that they had not sufficient interest in the assets of National to compel the District Court to dismiss the reorganization proceedings or to adjudicate National a bankrupt.

The testimony of Duggan in the instant case with respect to the conduct of Brown and Christopher is illuminating. Duggan testified that they were claiming that Christopher Aircraft and Christopher Manufacturing were partnerships and that they (Brown and Christopher) were the sole and absolute owners of the assets of these partnerships as well as of the stock of National. Duggan stated that there was an effort in the federal court in Indianapolis to acquire the assets of National and that, "in an endeavor to preserve the assets of all these various firms in one court, they [Brown, Christopher and Landau] did agree and cooperate and turn over their stock in accordance with the prior order, and subject to subsequent litigation, and as a result of that the trustee of the court [Duggan] along with counsel representing the trustee now * * * were enabled to secure all of the assets of National Aircraft from the trustee appointed by the federal court in Indianapolis."

The claims of Christopher and Brown for the return of their National stock and the assets of the partnerships are still pending and undecided in the reorganization proceedings.

There was, in our opinion, no adequate evidentiary basis for the findings of the District Court that National was ever a subsidiary of Christopher Engineering or that these corporations and the partnerships of Brown and Christopher were to all intents and purposes a single entity or enterprise. These findings, we think, are clearly erroneous. Magidson never had any contractual or fiduciary relationship with National which alone of these various concerns had had to do with dealing in "hinge horns", comparatively simple and inexpensive hinge devices which were in demand by those who had contracts with the Government for the manufacture of gliders. Therefore, it is not possible that his share of the earnings of the joint enterprise from the production and sale of hinge horns and a certain type of bolt belongs, either in law or equity, to Duggan as trustee. The estates of the debtor corporations were deprived of nothing by Magidson's activities as a joint venturer that they were entitled to or could have obtained if he had never engaged in the joint enterprise with the Schneiders. It seems apparent that National received its death blow March 1, 1943, when the Government terminated its contract and withdrew financial support. Christopher Engineering, with which Magidson had a terminable employment contract which created a confidential and fiduciary relationship with respect to the designing of tools and equipment, manufactured nothing and succumbed as a going concern during the course of the Dubman litigation in the State Court in the summer and fall of 1943 and while the joint enterprise had hardly gotten under way.

Counsel for Duggan argue that, since Magidson gave false testimony at the trial, Duggan was relieved of his burden of proving, by clear and convincing evidence, the existence of the constructive trust upon which Duggan's claim was based. What occurred was this. Magidson offered in evidence what purported to be a carbon copy of a letter of resignation dated June 15, 1943, addressed to "Christopher Engineering Co., St. Louis, Mo., Att. Brown, Christopher & Katz." Magidson's testimony that it was a carbon copy made at the time the original letter was typed was false. Whether it was false testimony as to a material fact may be doubted, since Katz, the bookkeeper and auditor for Christopher Engineering and Christopher Manufacturing, who was called as a witness by Duggan, testified that Brown showed him such a letter and ordered him to stop payment on a July 16, 1943, check of Christopher Manufacturing payable to Magidson, and since Brown, who was present at the trial, was not called to refute the testimony of Katz and Magidson that the latter had sent in a letter of resignation. Moreover there is no dispute about the fact that after July 10, 1943, the date Magidson's letter stated that his resignation was to become effective, he was no longer on the payroll of Christopher Manufacturing or of Christopher Engineering.

A ruling that the giving of false testimony by Magidson was the equivalent of clear, convincing and trustworthy proof that he was a constructive trustee (*Pratt* v. *Shell Petroleum Corporation,* 10 Cir., 100 F.2d 833, 837) and was obliged to deliver his share of the earnings of the joint venture to Duggan, trustee, would be absurd. Disregard of Magidson's testimony could not prove Duggan's case. Cf. *Bunt* v. *Sierra Butte Gold Mining Co.,* 138 U.S. 483, 485; *Moore* v. *Chesapeake & Ohio Railway Co.,* 340 U.S. 573, 576;

Ellis v. *United States,* 8 Cir., 138 F.2d 612. It is, of course, elementary that the testimony of a witness who willfully testifies falsely may be disregarded unless corroborated by credible evidence—but the giving of such false testimony is substantive proof of nothing.

A constructive trust is a fiction imposed as an equitable device for achieving justice (*Healy* v. *Commissioner of Internal Revenue,* 345 U.S. 278, 282; 3 Scott on Trusts, §462.1; 3 Bogert, Trusts and Trustees, §471) and not for the purpose of doing an injustice. The elements of a claim to enforce a construtive trust are (1) a fiduciary relationship, and (2) the use by the fiduciary of knowledge or interest acquired through the relationship in frustration of its purpose. *Young* v. *Bradley,* 6 Cir., 142 F.2d 658, 661; *Trice* v. *Comstock,* 8 Cir., 121 F. 620, 623. Perhaps another way of saying the same thing is that one in a position of trust who does for himself what he is obligated to do for his beneficiary, may not retain the fruits of his dereliction. See *Marshall* v. *Lovell* (D.C. Minn.,), 11 F.2d 632, 639, affirmed 19 F.2d 751, certiorari denied 276 U.S. 616; *Johnson* v. *Umsted,* 8 Cir., 64 F.2d 316, 320-321; *United States* v. *Carter,* 217 U.S. 286, 305-309. But the private and personal activities of a fiduciary are not limited unless they relate directly to those of his principal (*Young* v. *Bradley, supra,* 142 F.2d 658, 661), and the fiduciary need not account to his principal or employer for an outside profit derived from an independent business not connected with the employer's business. *Eagle Indemnity Co.* v. *Cherry,* 5 Cir., 182 F.2d 298, 300; *Latta* v. *Kilbourn,* 150 U.S. 524, 549-550.

Since Magidson bore no fiduciary relationship to National and since the activities in which the joint venture was engaged did not interfere with or frustrate the rela-

tionship he bore to any of these doomed enterprises created or acquired by Christopher and Brown, he owes Duggan, trustee, nothing.

The history of these reorganization proceedings, out of which so much litigation has arisen, has been stated in greater detail than is necessary to present the questions under review. This has been done in part for the purpose of illustrating the unfortunate results which flow from drawing into reorganization proceedings under Chapter X of the Bankruptcy Act corporations which should be liquidated, and of unnecessarily interfering with proceedings in a state court and with prior bankruptcy proceedings in other jurisdictions. See *Fidelity Assurance Association* v. *Sims*, 318 U.S. 608, 621; *Marine Harbor Properties, Inc.* v. *Manufacturers Trust Co.*, 317 U.S. 78; *Chicago Title and Trust Co.* v. *Forty-one Thirty-Six Wilcox Building Corp.*, 302 U.S. 120, 133. If the reorganization of a debtor corporation is not feasible, the proceedings should be promptly terminated. *Tennessee Publishing Co.* v. *American National Bank*, 299 U.S. 18, 22; *Sylvan Beach, Inc.* v. *Koch*, 8 Cir., 140 F.2d 852, 860; *Price* v. *Spokane Silver & Lead Co.*, 8 Cir., 97 F.2d 237, 246, certiorari denied 305 U.S. 626; *First National Bank of Wellston* v. *Conway Road Estates Co.*, 8 Cir., 94 F.2d 736, 739.

Section 636 of Title 11 U.S.C.A. furnishes the means for terminating reorganization proceedings of debtor corporations the reorganization of which is not feasible. *Sylvan Beach, Inc.* v. *Koch*, *supra*, page 862 of 140 F.2d. Nearly five years have passed since this Court decided the *Oglesby & Simpson Supply Co.* case, in which the Court said (page 907 of 174 F.2d): "Whether those holding preferred claims might seek liquidation of the estate [of National] we are not called upon to decide." While we are still not required

to rule upon the question of terminating these reorganization proceedings, we have no hesitation in saying that the preferred creditors of National and any of the creditors of Christopher Engineering can and should seek the liquidation in bankruptcy of these estates or a dismissal of the reorganization proceedings. It is to be hoped that the reorganization court, of its own motion, will bring about a termination of the proceedings for the reorganization of the debtors.

The judgments appealed from are reversed, with directions (1) to dismiss this case with prejudice, (2) to cause to be refunded to the State Court the entire fund taken from its custody, and (3) to permit no further interference by Duggan, trustee, with the State court proceedings to which the Schneiders and Magidson are parties.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

In the

Supreme Court of the United States

OCTOBER SESSION, 1954

JEROME F. DUGGAN, Trustee, etc., *et al.*, *Petitioners*,
vs.
IDA MAGIDSON, Executrix of the Estate of PHIL MAGIDSON, Deceased, *Respondent*.
No. 377

Petitioners' Motion for Rehearing

Come now petitioners and move the Court to set aside its order of November 15, 1954, and to reconsider and allow their petition for certiorari to the Court of Appeals for the Eighth Circuit, and as reasons therefor show to the Court:

By reason of the great number of innovations of equity announced; the departures from accepted judicial procedure and the manner in which the Court disregarded the

limitations on its own jurisdiction, as a court of review and ruled on matters not relevant to the appeal, the petitioners, in their anxiety to comply with the rules of the Court enjoining brevity, probably failed to make sufficiently clear the importance of the questions involved and by reason thereof this Court has inadvertently failed to consider the same.

And particularly we failed to accent the fact that the case being tried arose under the laws of Missouri and was tried in Missouri. That in a proceeding in the Supreme Court of Missouri between this trustee and defendant that Court announced the law of the case (State ex rel. Duggan v. Magidson, 357 Mo. 325) which law and decision conflicts with the law announced by the Court of Appeals in the opinion involved in this proceeding, and it has failed to follow the controlling rules of decision announced by the Supreme Court of Missouri.

The Court of Appeals, contrary to accepted judicial procedure and without regard to its limited jurisdiction as a court of review, sua sponte and on facts dehors the record undertook to review, on the facts, the final judgment admitting the debtors involved to reorganization under the Bankruptcy Act, a matter previously adjudicated, which had not been retried in the District Court and the evidence in that respect was not reheard in this proceeding and of course was not included in the record produced on the appeal. The Court of Appeals on such an irregular review and because the record did not contain the evidence on which reorganization was granted announced the opinion involved which has frustrated, for the time being, and permanently unless this Court intervenes the efforts of the Trustee to collect assets necessary to pay creditors and reorganize or liquidate the corporate debtors as contemplated by the Bankruptcy Act.

The Court's opinion has already had far-reaching effects and has caused the Justice Department to dismiss an indictment for perjury returned by the Grand Jury against defendant Magidson and has so discredited the reorganization proceedings and the Trustee's administration that proceedings for the collection of assets have come to a practical standstill although proceedings involving over two hundred thousand dollars are pending, and unless this Court intervenes by its writ, the opinion involved will totally frustrate the administration of the estates under the control of the District Court. All of this has resulted from an opinion rendered on an appeal instituted by an equitable debtor in which the Court of Appeals exceeded its authority and denounced the proceedings for reorganization generally and indirectly denounced the District Court for admitting the debtors to reorganization in the first place, and for not dismissing the whole reorganization proceedings, matters which were not relevant to the appeal under consideration and not within the jurisdiction of the Court of Appeals on this appeal. By so doing the Court of Appeals has usurped the jurisdiction of the District Court and disastrously affected the administration of the debtor estates. All this was done by the Court of Appeals in the review of a case presented by a recreant and perjured fiduciary from a judgment against him, based upon unjust enrichment, and by one who had no appealable interest in the reorganization proceedings in the first place. We urge that by its opinion the Court of Appeals has seriously departed from the usual and accepted course of judicial procedure.

The petitioners probably failed to emphasize the judicial impropriety of the foregoing matters, feeling that this Court would review the opinion on the equity announced and anticipating that this Court would, on its review, con-

fine its decision to matters relevant to the appeal involved and would leave it to the District Court, in its judicial discretion, subject to an authorized appeal, to determine whether it ought to proceed with reorganization or dismiss it, which would have the effect of disposing of numerous objections to the opinion. Under such circumstances we omitted to argue many important errors in the opinion.

We appreciate the necessity for brevity and conciseness of statement in applications for certiorari, but rules in this respect are based upon the assumption that Courts of Appeal will limit their opinions to matters regularly submitted to them for review and will not invade fields not authorized by the appeal, as the Court of Appeals has done in this opinion, resulting in a multiplicity of errors which cannot be treated in detail with necessary brevity.

May we again call the Court's attention to the importance of the innovations in established rules of equity announced by the Court of Appeals?

The Court of Appeals ruled that in the absence of a direct contract between a principal and a confidential agent, the principal might not recover the agent's unjust gains. This ruling totally disregarded the fact that constructive trusts and constructive fraud are themselves creations of courts of equity created in the public interest and are not dependent on any intention or contract of the parties and will be enforced, even against their intentions, in a proper case. The Supreme Court of Missouri so ruled in the case of Duggan v. Magidson, supra.

The Court of Appeals denied a trustee in bankruptcy relief against a confidential agent based upon fraud and unjust enrichment upon concluding that the corporate officers of the debtors were themselves guilty of inequity. Their inequity, even if proved, had no relation to the defendant

or to the wrong involved on this appeal, an amazing innovation in equity jurisprudence. It in effect outlaws a corporation whose officers are impure and subjects its assets to conversion at will by its confidential agents, regardless of the interests of innocent creditors and the stockholders.

The Court ruled in effect that since it did not appear from the record that the debtor suffered any damages from defendant's wrongful act, and could not have suffered any damages because the corporation was, in the opinion of the Court of Appeals, insolvent at the time or shortly after the acts were committed by the defendant, and that in such case the obligations of its confidential agent was relaxed and he was permitted to enrich himself from its business without fear of retribution.

We have pointed out that the rules of equity were established, not in the private interest of the parties but in the public interest, and are to be enforced "free from the erosion of particular exceptions" (Cardozo, Judge, Meinhard v. Salmon, 249 N. Y. 458, and Wormley v. Wormley, 9 Wheat 441-662, ex rel. Duggan v. Magidson, supra, and Trice v. Comstock, 120 Fed. 621). These rules were uniformly enforced by all courts of equity until the panel of three Judges who wrote the opinion involved herein, without the sanction of any other Court, announced their conflicting idea of morals and undertook to establish a new equity in substitution for the cumulative wisdom and morals of moralists and learned chancellors announced over a period of thousands of years. Relaxing the rules against unjust enrichment on the part of confidential agents inevitably encourages fraud and breach of trust by fiduciaries contrary to the very purpose of the established rules of equity. Any relaxation of such rules is necessarily of public importance aside from their importance to the petitioners.

Following its startling innovations in equity and morals, the Court announced a rule calculated to encourage fraud and perjury by parties to actions in trials of actions in the courts. In the instant case the defendant Magidson admitted that he fabricated an alleged resignation and confirming it with his own oath offered it in evidence. From his admitted fraud and perjury the District Court concluded that it could draw an inference adverse to the defendant. The Court of Appeals concluded that the admitted fraud and perjury by Magidson in the preparation and trial of the action was without "substantive" effect and simply authorized the Court to disregard it "unless corroborated." In other words, the Court of Appeals ruled that in the circumstances of this case, where a defendant was called as an adverse witness by the Trustee he could give false testimony and deprive his opponent of a frank and true disclosure of facts in his knowledge and perjure himself without being subjected to any civil restraints or penalties whatever. Such ruling strikes at the very root of judicial investigation and deprives the opposite party of a fair disclosure under the rules of Federal procedure and tends to encourage fraud and perjury by a party to a legal proceeding which of itself we urge is of such public importance as to impel the intervention of this Court.

The Court of Appeals, although the trustee himself was guilty of no wrong, deprived him of the right to recover against the defendant, because the Court of Appeals concluded that the corporation officers were guilty of sin, totally unrelated to the action, but when the defendant undertook to defeat justice by fraud and perjury in the very trial of the case, the Court of Appeals refused substantive effect to his sin.

We urge that the opinion involved cannot be corrected piecemeal and that only by setting it aside and by writing

a new and proper opinion can the important matters mentioned, as well as numerous other important matters overlooked in briefing be corrected. The Court of Appeals, consisting temporarily of only five Judges, by a "controlling" vote refused to review the opinion en banc. Only this Court can review and revise the startling opinion and we urgently represent, fully appreciating the necessity of conserving the time of this Court, that regardless of the interests of the parties and regardless of any defect in our petition, the public importance of the questions involved requires its intervention.

In this connection we suggest to the Court that if the review is confined properly to the record developed in the District Court and the application thereto of established rules of equity in accordance with accepted judicial procedure that the review of the case is simple. It was only when the Court of Appeals undertook to review matters beyond its jurisdiction that the opinion inevitably became complex and difficult, and confusing, since the Court was endeavoring to determine questions unrelated to the appeal and to overhaul the rules of equity generally.

Respectfully submitted,

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EUGENE M. MUNGER,
Of Counsel.

CERTIFICATE OF COUNSEL.

The undersigned, counsel for petitioners, certifies that the foregoing petition for a rehearing is presented in good faith and not for delay and that the grounds assigned therefor comply with the provisions of Rule 58 of this Court and consist of intervening circumstances or grounds which by oversight or excusable error have been omitted or inadequately presented to the Court.

GEO. O. DURHAM,
Counsel for Petitioners.

CERTIORARI DENIED